

De Minimus Assessment: Self-Certification Template



Department for
Digital, Culture
Media & Sport

Title of regulatory proposal	<i>Charities Bill</i>
Stage	Final
Lead Department/Agency	DCMS
Expected date of implementation	Following Royal Assent (TBC - est late 2021/ 2022)
Date	29/03/2021
Lead Departmental Contact	Ben Harrison
Departmental Triage Assessment	Equivalent Annual Cost to Business (EANDCB: 2019 prices) = -3.1m [Use IA calculator to estimate (available through the BRU)]

Call in criteria checklist	
Significant distributional impacts (e.g. significant transfers between different businesses or sectors)	No
Disproportionate burdens on small businesses	No
Significant gross effects despite small net impacts	No
Significant wider social, environmental, financial, or economic impacts	No
Significant, novel, or contentious elements	No

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SUMMARY

Rationale for government intervention

The problems under consideration are technical legal issues which have important practical consequences for charities.

Problem 1: Inconsistent and unnecessarily bureaucratic mechanisms for amending governing documents and changing purposes.

Problem 2: Substantial and unnecessary costs in land transactions.

Problem 3: Uncertain treatment and inflexible use of permanent endowment.

Problem 4: Gaps in legal provision for payments to charity trustees and other non-beneficiaries.

Problem 5: Procedural difficulties when charities incorporate and merge.

Problem 6: Barriers to accessing the Charity Tribunal.

Technical issues in inefficient and unduly complex law currently cause charities to face unnecessary administration and financial burdens. This results in charity funds being spent on staff costs and legal fees rather than their charitable purposes. This in turn leads to lower public trust in charities arising from the perception that their donations are not being spent effectively.

There are about 170,000 charities registered with the Charity Commission with an annual income of more than £77 billion and assets worth over £258 billion.¹ A clear legal framework is essential for the Charity Commission and charities to work effectively, which in turn strengthens public trust and confidence in charities.

Policy options

Option 0 – Do nothing.

Option 1 – Wide-ranging reform. Primary and secondary legislation combined with non-statutory reforms to facilitate a clear legal framework.

Our preferred option is Option 1 as it is a cost effective solution to resolve the identified problems.

¹ Charity Commission, *Charities in England and Wales – 09 March 2021*, available at <https://register-of-charities.charitycommission.gov.uk/sector-data/sector-overview>

Summary of business impact /Rationale for DMA Rating

[The Equivalent Annual Net Direct Cost to Business (EANDCB) should be less than +/-£5m]
-3.1m

- The on-going benefits of the intervention which could be monetised total £2.8 million per year and £28 million over ten years. The on-going costs of the intervention which could be monetised total £6,000 per year.

Benefits

- Charities are expected to save at least £2.8 million per year from reduced time and legal costs required to comply with the current law to: amend governing documents, comply with overly prescriptive requirements when disposing of land, apply for consent to release, borrow from or invest permanent endowment, apply for permission to make small ex gratia payments, apply for trust corporation status to enable mergers, maintain shell charities and apply for a Beddoe order to authorise charity legal costs. Savings will also arise from trustees' ability to secure more favourable prices on goods supplied by trustees, which the law does not currently allow.
- The Charity Commission, Defra, the Ministry of Justice and purchasers of certain charity land will also make savings, largely staff costs resulting from the reduction or elimination of approval processes in which they are involved. Monetised savings to these organisations will be £57,595 per year.
- Of these savings, £450,000 per year arises from new primary legislation. The remainder arises from changes to existing regulations governing disposals of charity land, which do not require primary legislation but are an important element of the overall proposed reforms.
- Non-monetised benefits will be: increased flexibility for trustees to act in the best interests of the charity; the removal of unnecessary regulation, enabling charities to function more effectively; increased public trust; reduction of the administrative burden for charities.
- No transitional benefits were identified.

Costs

- There will be transitional costs to the Charity Commission associated with issuing and updating guidance. These are expected largely to be absorbed into the Commission's regular guidance updates.
- The additional cost to Charity Commission of registering additional charity mergers, by charities which are more confident that they do not need to retain shell charities to capture bequests, will be £6,000 per year.

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Evidence Base

Introduction

This De Minimus Assessment relates to the recommendations in the Law Commission's Report, [Technical Issues in Charity Law](#).²

The Government responded to the Law Commission's recommendations on 22 March 2021 and accepted the majority of recommendations in the report. The recommendations comprise:

11. primary legislation (the Report includes a draft Bill);
12. secondary legislation; and
13. non-statutory reforms.

This De Minimus Assessment relates to all three categories of reform. Option 1 involves the implementation of all recommendations. This Assessment highlights costs and benefits which related specifically to the primary legislation, while putting them in the context of the wider recommendations which the Government also plans to implement.

This De Minimus Assessment is a summary of the original, more detailed [Impact Assessment](#) produced by the Law Commission when it published its report.

Background

The Charities Bill gives effect to the Law Commission's recommendations to reform various technical issues in the law governing charities. It does so primarily by amending the Charities Act 2011 ("the Charities Act") but also by amending other legislation such as the Universities and College Estates Act 1925 and the Trusts of Land and Appointment of Trustees Act 1996. The impact of these changes will, however, significantly improve the efficiency of the sector, release more funds for use on charitable purposes rather than administration, and reduce unnecessary and overly bureaucratic regulation that not only increases the sector's costs but also is a factor in discouraging people from volunteering to become trustees.

Charities legislation is commonly perceived as being complicated, uncertain and in places unduly burdensome. This can delay or prevent a charity's activities, discourage people from volunteering to become trustees and force charities to obtain expensive legal advice. It is off-putting to trustees, and also hinders the Charity Commission in its regulation of the sector.

The Law Commission's project originated from its Eleventh Programme of Law Reform,³ in which it agreed to undertake a project on charity law following a suggestion from the Charity Commission that it review certain issues. Shortly afterwards, Lord Hodgson made over 100 recommendations following his review of the Charities Act 2006.⁴ He identified a number of issues which the Law Commission agreed to consider in its own charity law project which began in 2013.

Public consultation

The Law Commission published two consultation papers, the first in March 2015 and a supplementary consultation paper in September 2016. The initial consultation received responses from 91 consultees and the second from 27 (including from membership organisations representing thousands of members). Consultees included the Charity Commission, legal professionals specialising in charity law, a wide range of charities, academics and a range of other professionals and organisations involved in the

² Technical Issues in Charity Law (2017) Law Com No 375, available at www.lawcom.gov.uk.

³ Eleventh Programme of Law Reform (2011) Law Com No 330, available at http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc330_eleventh_programme.pdf.

⁴ Lord Hodgson of Astley Abbotts, *Trusted and Independent: Giving charity back to charities – Review of the Charities Act 2006* (July 2012), available at <https://www.gov.uk/government/consultations/charities-act-2006-review>. We refer to the Report as the "Hodgson Report".

charity sector. These consultation responses fed into the final recommendations and some provided the basis for parts of the analysis in this De Minimus Assessment.

In February 2021 the Law Commission carried out an informal consultation with the Charity Law Association, the leading charity law body which was heavily involved in the Law Commission's original consultation, to review its proposals. In parallel, DCMS officials spoke to charity sector representatives to assess their view of the proposals. The conclusion was that the proposals remained appropriate, and would be particularly useful in allowing the sector more easily to restructure in the aftermath of the COVID-19 pandemic.

Structure of this evidence base

This evidence base begins by giving a brief summary of the problems under consideration, both in this De Minimus Assessment and in the Technical Issues in Charity Law report more broadly. It then goes on to describe the rationale for intervention in this area followed by the Law Commission's policy objectives when addressing these problems. There is then a broad overview of the scale and scope of the charity sector. Following is an introduction to the options considered to address the problems; the approach to analysing the costs and benefits of the recommendations; and the costs and benefits common to all recommendations. As this De Minimus Assessment focuses on six discrete problems and individual recommendations to address them, the remainder of the evidence base takes the form of six "mini" De Minimus Assessments. Problems 1-6 are taken in turn and the problem,⁵ current law, policy options, and cost and benefit analysis specific to each set out in more detail. Finally, the overall costs and benefits of the options considered to address all six problems are summarised in a table.

Problems under consideration

We analyse below the six areas where the Law Commission's recommended reforms are likely to have the greatest practical and economic impact.

- **Problem 1:** Inconsistent and unnecessarily bureaucratic mechanisms for amending governing documents and changing purposes.
- **Problem 2:** Substantial and unnecessary costs in land transactions.
- **Problem 3:** Uncertain treatment and inflexible use of permanent endowment.
- **Problem 4:** Gaps in legal provision for payments to charity trustees and other non-beneficiaries.
- **Problem 5:** Procedural difficulties when charities incorporate and merge.
- **Problem 6:** Barriers to accessing the Charity Tribunal.

These problems are the source of regular queries to the Charity Commission. Within the ten most common issues raised in emails and letters to the Charity Commission in 2014-15 were Problem (1) – amendments to governing documents (most common), Problem (2) – land queries (sixth most common), and Problem (5) – queries about closing or merging a charity (third most common).⁶

Technical issues in inefficient and unduly complex law currently cause charities to face unnecessary administration and financial burdens. This results in charity funds being spent on staff costs and legal fees rather than their charitable purposes. This in turn leads to lower public trust in charities arising from the perception that their donations are not being spent effectively.

There are about 170,000 charities registered with the Charity Commission with an annual income of more than £77 billion and assets worth over £258 billion.⁷ Thousands more are not required to be registered. Uncertainties in the law and unnecessary regulation can delay or prevent charities' activities,

⁵ The costs associated with the problems can be found summarised under each problem description and further detail in relevant Appendices.

⁶ *Charity Commission Annual Report and Accounts 2014-2015*, p 43, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/439357/Charity_Commission_Annual_Report_and_Accounts_2014_15_web.pdf. Other issues raised included: queries about Annual Returns and accounts, complaints against charities, queries about trustee duties and responsibilities, correspondent/email/trustee addresses, charity details and how to register.

⁷ Charity Commission, *Charities in England and Wales – 09 March 2021*, available at <https://register-of-charities.charitycommission.gov.uk/sector-data/sector-overview>

discourage people from volunteering to become trustees, and force charities to obtain expensive advice. Public trust in charities hit a low point at the end of 2016⁸ and this was thought to be in part due to negative media coverage about charities and a distrust about how donations are spent. A clear legal framework is essential for the Charity Commission and charities to work effectively, which in turn strengthens public trust and confidence in charities.

Other problems

Aside from the six problems outlined above, the Law Commission's recommendations also address a number of other distinct issues. These other problems are primarily administrative with little monetary cost/benefit implications. They tend to occur less frequently than the six problems identified above. These problems, and the Law Commission's recommendations in response to them, are not therefore addressed in this De Minimus Assessment.

Rationale for intervention

Reform in charity law is driven by a need to address inefficiencies in the regulation of charities which divert essential resources away from charitable objectives and impede the effective pursuit of charitable purposes. The existing legal framework is inefficient in a number of ways: it is complex, uncertain, lacking in clarity and, in places, contradictory. There are also aspects which are out of date, obsolete and widely ignored. The enforcement and compliance costs can at times be disproportionate to the benefit derived from them.

The ability of charities to maximise expenditure on the purposes for which they have been established has important social value. Public trust in charities hit a low point at the end of 2016⁹ and this was thought to be in part due to negative media coverage about charities and a distrust about how donations are spent. In part this arises from charities spending money on staff costs and legal costs arising from complex charity law. A clear legal framework is essential for the Charity Commission and charities to work effectively, which in turn strengthens public trust and confidence in charities. Many charities provide services to groups that might otherwise not be provided given constraints on the public purse. If public trust is lost or diminished, there is a direct knock-on effect in the capacity to attract funding. A reduction in funding is more likely to have a disproportionate impact on vulnerable groups such as those with a low income as they are often the main recipients of charitable giving.

Policy objectives

The recommendations in this De Minimus Assessment aim to support and equip the charity sector by ensuring that the legal framework in which it operates is fair, modern, simple and cost effective. More specifically these recommendations aim to fulfil the following objectives.

11. To remove unnecessary regulation and bureaucracy in order to maximise the effective use of charitable funds. The aim is to prevent the disproportionate diversion of charitable assets and trustee time on compliance with regulation from which little or no benefit is derived.
12. To increase the flexibility of trustees to make decisions in the best interests of their charities. In particular to give trustees wider or additional powers to make decisions without having to obtain authorisation where appropriate. In order to mitigate against the possibility of trustees misusing this autonomy, safeguards will be put in place to ensure Charity Commission consent is required in certain cases.
13. To confer wider or additional powers on the Charity Commission to increase its effectiveness. This includes enabling the Commission to carry out its current functions more efficiently and to take action where it ought to be able to but cannot currently (for example to regulate or assist charities).

⁸ Charity Commission, *Public trust and confidence in charities 2016* (June 2016) available at <https://www.gov.uk/government/publications/public-trust-and-confidence-in-charities-2016>.

⁹ Charity Commission, *Public trust and confidence in charities 2016* (June 2016) available at <https://www.gov.uk/government/publications/public-trust-and-confidence-in-charities-2016>.

14. To ensure adequate protection of charity property in order to enhance donor confidence and public trust. In particular supporting confidence in the use of donations currently and in the future.
15. To remove inconsistencies and complexities in the law, making it clearer for charity trustees, staff, volunteers and professional advisers seeking to apply it and comply with it, as well as reducing legal and other professional costs. This includes seeking to reduce the potential for unintentional mistakes and the associated costs of addressing them.

Scale and context

Introduction

There are approximately 170,000 charities registered with the Charity Commission.¹⁰ In addition there are a high number of unregistered charities. In 2012 it was estimated that there were as many as 191,000 unregistered charities.¹¹

Charities have a significant impact on everyday life. The sector is responsible for important services and provides support for many different causes across every walk of life.¹² The importance of charities is reflected by the significant donations made to them each year: annual charitable giving by individuals in the United Kingdom¹³ was recently estimated by CAF to be £10.1 billion,¹⁴ and by NCVO to be £12.8 billion.¹⁵ Registered charities in England and Wales have an annual income of more than £77 billion¹⁶ and assets worth over £258 billion.¹⁷ The total annual spending by registered charities as of February 2021 was over £74 billion.¹⁸ These figures would increase significantly if unregistered charities were included (but about whom there is no data).

This section provides an overview of the number of charities and their different legal forms, and identifies the main stakeholders likely to be affected by the Law Commission's recommendations. An explanation of the costs associated with each of the six problems under consideration is set out below.

The many different forms of charities

Registered charities

There are approximately 170,000 charities registered with the Charity Commission.¹⁹ The number of registered charities by income band, and details of their spending and income are set out in Tables 1 and 2. Where charities spending income is higher than their total income, they were likely using some form of reserve income.

Table 1:²⁰ Income and spending of registered charities

Income band	Number of registered charities- 7th April 2021	Total income (bn)	Total spending (bn)
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¹⁰ Charity Commission, *Charities in England and Wales – 24 February 2021*, available at <https://register-of-charities.charitycommission.gov.uk/sector-data/sector-overview>. This number excludes linked charities, of which there are approximately 15,000. Linked charities do not report their financial results in their own right as they are included within those of their main reporting charity.

¹¹ National Audit Office, *Regulating charities: a landscape review* (July 2012) para 1.18, available at http://www.nao.org.uk/wp-content/uploads/2012/07/Regulating_charities.pdf.

¹² See for example, N Slawson "The public services you didn't know were run by charities" (20 May 2016) *The Guardian*, available at <http://www.theguardian.com/voluntary-sector-network/2016/may/20/10-public-services-run-charities>.

¹³ Where possible this De Minimus Assessment uses figures specific to England and Wales, however, where such figures were unavailable UK-wide statistics have been used in their place.

¹⁴ Estimate for 2019, based on direct donations and sponsorship: Charities Aid Foundation, *UK Giving 2019*(May 2019) p 11, available at https://www.cafonline.org/docs/default-source/about-us-publications/caf-uk-giving-2019-report-an-overview-of-charitable-giving-in-the-uk.pdf?sfvrsn=c4a29a40_4.

¹⁵ Total estimated voluntary income (donations and legacies) from individuals for 2017/18. A further £12.6 bn was received from individuals as earned income, including fees for services and trading activities at <https://data.ncvo.org.uk/>.

¹⁶ Charity Commission, *Charities in England and Wales – 30 June 2021* (see above). The total income is made up of donations and legacies (£23.4 bn), raising funds (£6.3 bn), investments (£3.8 bn), charitable activities (£40.8 bn) and other sources (£2.4 bn).

¹⁷ Charity Commission, *Charities in England and Wales – 31 June 2021* (see above).

¹⁸ See Table 2 for breakdown of spending.

¹⁹ See n 16 above.

²⁰ See Charity Commission, *Charities by income band – 24 February 2021*, available at: <https://register-of-charities.charitycommission.gov.uk/sector-data/sector-overview>.

£0 to £10k	74,743	£0.21	£0.42
£10k to £100k	59,033	£2.11	£2.37
£100k to £500k	23,676	£5.22	£5.20
£500k to £5m	9,906	£14.81	£14.97
Over £5m	2,434	£61.12	£59.30
Total	169,792	£83.47	£82.26

Table 2:²¹ Charities' income generation and expenditure

Category	Income (bn)	Category	Spending (bn)
Voluntary income	£23.31	Raising funds	£6.27
Trading to raise funds	£7.02	Charitable expenditure	£64.71
Investment income	£3.88	Other	£3.25
Charitable activities income	£40.77		
Other	£2.43		
Total	£77.41	Total	£74.23

Unregistered charities

In 2012 it was estimated that there were a further 191,000 unregistered charities with a combined income of £57.7 billion.²²

The National Audit Office estimates show at least 11,000 charities with a combined annual income of at least £57.3 billion in 2012 are exempt from registration with the Charity Commission. Furthermore, there are around 180,000 excepted charities with a combined annual income of £400 million that are not required to register with the Commission, meaning the total combined income of the unregistered charity sector is estimated to be at least £57.7 billion.

The different legal forms of charities

Charities can take a number of different forms. The legal form will have practical implications for the general management and administration of the charity. Several issues within this work turn on the legal form of the charity: whether it is incorporated and therefore has a legal personality separate from its trustees, or unincorporated and therefore has no separate legal personality. The regime for charitable companies and Charitable Incorporated Organisations ("CIOs") is, in certain circumstances, more flexible. Unincorporated charities might therefore choose to use workaround methods to avoid cumbersome procedures or transfer their operations to a charitable company or CIO in order to be subject to a more flexible regime.

Most incorporated charities are companies limited by guarantee. Other forms of incorporated charities are statutory charities and Royal Charter charities (see Appendix 7, below).

²¹ See Charity Commission, *Charities in England and Wales – 24 February 2021* 30 June 2017, available at <https://register-of-charities.charitycommission.gov.uk/sector-data/sector-overview>.

²² National Audit Office, *Regulating charities: a landscape review* (July 2012) para 1.18, available at http://www.nao.org.uk/wp-content/uploads/2012/07/Regulating_charities.pdf.

CIOs are a relatively new legal form of incorporated charity, introduced by the Charities Act 2006. CIOs could be created from 4 March 2013, and since then, over 11,000 have been registered. Between 1st March 2013 – 31st March 2021, the Commission registered 25,284 CIOs.²³ During the 2020/21 financial year, the Commission registered 3,842 CIOs, with applications and registrations of this type now making up around 70% of those received each month. A CIO has a legal personality and limited liability for its trustees and members. It only comes into existence once it is registered with the Charity Commission.

Main Stakeholders

A wide range of stakeholders will be affected by the Law Commission's recommendations.

11. Charity trustees, employees and volunteers. There are approximately 950,000 trustees of registered charities, and registered charities employ over 1 million people and are supported by over 3.5 million volunteers.²⁴ Again these figures would increase significantly if the trustees, staff and volunteers of unregistered charities could be included.
12. Public bodies which oversee and govern charities.
 - 2a. The Charity Commission for England and Wales, a non-Ministerial Government department which registers and regulates charities (though many charities are not required to be registered).
 - 2b. The principal regulators of exempt charities.
 - 2c. The Charity Tribunal,²⁵ which was created by the Charities Act 2006 to provide charities with a low-cost and user-friendly way of challenging Charity Commission decisions.
 - 2d. The Civil Society and Youth Directorate (CSY) in the Department for Digital, Culture, Media and Sport ("DCMS"), and the Minister for Civil Society. CSY is the arm of government with policy responsibility for charity law in England and Wales.
 - 2e. The Privy Council Office which oversees the grant and amendment of Royal Charters, which govern some charities.
13. Providers of professional services.
 - 2a. Many legal professionals provide advice to charities, including in relation to asset management and land transactions.
 - 2b. Accountants provide professional advice and accountancy services to charities.
 - 2c. RICS surveyors and other property professionals provide advice to charities.
14. The Charity Commission
 - 2a. The Charity Commission has both a guidance and enforcement role in relation to charities. Its responsibilities range from registering eligible charities to ensuring that all charities meet the necessary legal requirements. This includes taking enforcement action where the Commission identifies malpractice or misconduct. The guidance side of its role includes providing online services and publishing guidance to help charities to understand their legal obligations and to run as effectively as possible. The Commission is also responsible for publishing certain information about registered charities.

The stakeholders mentioned above are those that are perceived to be key to these reforms. However, charities, by their very nature, have wide benefits to society as a whole. Therefore these reforms are expected to benefit individuals and groups outside of these key stakeholder groups, albeit indirectly.

²³ *Charity Commission Annual Report and Accounts 2016-17*, p25, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/628747/Charity_Commission_Annual_Report_and_Accounts_2016_17_web.pdf.

²⁴ Charity Commission, *Charities in England and Wales – 30 June 2017*.

²⁵ The Charity Tribunal was amalgamated into the single structure for tribunals created by the Tribunals, Courts and Enforcement Act 2007. The Charity Tribunal's work was transferred to the General Regulatory Chamber of the First-tier Tribunal and the Tax and Chancery Chamber of the Upper Tribunal.

Introduction to the options considered

Three options have been considered in response to each of Problems 1-6. The original Law Commission IA considered a second option which did not involve primary legislation; however the Government concluded that option 1 was most viable.

- **Option 0: Do nothing.** Retain the existing law. The key features, problems and costs associated with the current law will remain.
- **Option 1: Wide-ranging reform.** Primary and secondary legislation used in conjunction with non-statutory reforms to facilitate a clear legal framework.

In each case Option 1 is the preferred option as it has the greatest net benefit.

Approach to analysing costs and benefits

For each of Problems 1-6 both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales are identified with the aim of showing the overall impact to society of implementing Option 1 as compared with Option 0.

Stakeholder evidence

This De Minimus Assessment has relied upon some unverified stakeholder evidence in providing the costs and benefits resulting from, and time required to adapt to, the Law Commission's reforms. 'Unverified stakeholder evidence' in this instance refers to evidence from stakeholders which could not be cross-checked against any other data source. An example is that the most proportionate way to learn how long it takes to carry out certain processes was to ask practitioners for their assessment. Critique and analysis of this evidence has been included where appropriate.

Monetised benefits

Monetised benefits have generally been calculated in terms of benefits for charities and, where appropriate, the Charity Commission. The benefits to charities of taking various actions are calculated by reference to the avoided costs of obtaining the necessary legal or professional advice, and paying any applicable fees. It was not possible to calculate the benefits of the recommendations in terms of the reduced burden on charity trustee and staff time due to the huge variety in the size of charities and the experience of their staff and trustees. For this reason, all monetised benefits are conservative estimates.

Solicitor costs

Throughout this De Minimus Assessment a solicitor's hourly rate is valued using the Guideline Rates for the Summary Assessment of Costs.²⁶ These rates have been used because they are the ones used to assess costs in legal assessments. It is noted that these guideline rates have not been reviewed since 2010 and are therefore conservative estimates of the hourly rate charged by solicitors which have not been adjusted for inflation.

Non-monetised benefits

While the Law Commission gathered substantial evidence from consultation, including general feedback on how changes would affect key stakeholders, limited evidence was available as to the precise extent of the impact or the precise costs and benefits resulting from it. In these cases the non-monetised costs and benefits headings have been used to describe the impact on stakeholders using the available evidence.

Facilitative reforms

Several of the Law Commission's proposed reforms are facilitative.²⁷ This is to say that they will create a simpler, more efficient regime for taking certain action (such as amending governing documents) which is voluntary. That may encourage charities to take action which they would otherwise have avoided. This

²⁶ See Civil Procedure Rules, Part 48x. The guideline rates are also accessible at: <https://www.gov.uk/guidance/solicitors-guideline-hourly-rates>.

²⁷ See Recommendations 1(a), 1(b), 1(d), 3(a), 3(b) and 6 below.

could be said to result in a cost to the charities, in the sense that charities will be spending time and money taking action which they would not otherwise have taken. However, not only will the costs of taking such action be lower under the reformed regime, the indirect effect will be that these are costs which charities will incur following their own internal cost-benefit analysis. Whereas before the costs involved in taking action outweighed the benefits of, for example, facilitating the pursuit of the charity's purposes, the new regime makes it cost effective to do so. In other words the reforms will enable charities to take action which is in their best interest which was previously cost prohibitive.

Calculating net present value

When calculating the net present value (NPV) for the De Minimus Assessment, a time frame of ten years has been used, with the present year (2021) being year 0. The transitional costs and benefits have been assumed to occur in year 0, and ongoing costs and benefits accrue in years 1 to 10. A discount rate of 3.5% has been used, in accordance with HM Treasury guidance. Unless otherwise stated, all figures are in 2019 prices, and have been adjusted to reflect the impact of inflation (using the GDP deflator).

EANDCB

The Equivalent Annual Net Direct Cost to Business (EANDCB) of the recommended option is -£3.1m.

NPV

The best estimate of the Net Present Value (NPV) of the recommended option is £26.9m. A low estimate of £21.17m and a high estimate of £38.49m were identified.

Costs and benefits of reform common to all problems under consideration-

Option 0: Do nothing

Table 1: Overview of key features and nature of associated problems

Key feature[s] of each problem area	Resultant problems
<p>Problem 1: All charities have a governing document, which is the rulebook for the charity. Over time a charity may need to amend its governing document. The amendment procedures available to a charity depend on its legal form.</p>	<p>For unincorporated charities, there is uncertainty as to what changes can be made using the existing power in section 280, and changes can sometimes only be made by obtaining a scheme from the Charity Commission. Schemes are unpopular with charities, they are criticised for being complex, expensive and time consuming.</p>
<p>Problem 2: Under Part 7 of the Charities Act, when charities sell land, grant a lease for more than seven years, or otherwise dispose of an interest in land, the trustees must generally obtain a detailed report from a member of the Royal Institution of Chartered Surveyors.</p>	<p>The "one-size-fits-all" nature of the Part 7 regime means that these costs can often be disproportionate to the value of the transaction or complexity of the valuation. There are also various technical deficiencies in the legislation which add unnecessary expense to land transactions.</p>
<p>Problem 3: Permanent endowment is property belonging to a charity that it cannot spend. It can be divided into "Functional" permanent endowment - used by a charity</p>	<p>Charities might wish to spend some or all of their permanent endowment; for example, the fund might be so small that the costs of administering it are disproportionate to the income that it yields; Rather than spending</p>

directly to pursue its purposes; and “non-functional”, permanent endowment, a fund which must be invested by the charity (for example in shares, bonds and other securities) to produce an income.	permanent endowment, charities might instead want to use permanent endowment in new or flexible ways, where the value of the fund is not expected to diminish in the long term.
Problem 4: The duties on charity trustees usually preclude them from receiving benefits from the charity or making payments they feel morally obliged to make. Section 185 permits a charity to authorise what would otherwise amount to a breach of fiduciary duty by paying reasonable remuneration to a trustee for the provision of services to the charity.	There is no equivalent power to authorise remuneration for the supply of goods, despite the fact that it can be advantageous to the charity for a trustee to supply goods to it.
Problem 5: A charity’s purposes might be better served by merging with another charity. An incorporation or merger involves the transfer of one charity’s activities to another.	Where a merger is registered with the Charity Commission, gifts by will to the transferring charity are deemed by section 311 of the Charities Act to take effect as gifts to the new charity. Case law has revealed that this statutory provision is perhaps not as effective as it was first hoped as it does not divert all gifts to the merged charity.
Problem 6: The Charity Tribunal considers challenges to decisions of the Charity Commission. The decisions that can be challenged are listed in the Charities Act 2011 and are challengeable by way of an appeal or a review, depending on the decision.	Trustees involved in legal proceedings will want to ensure that the costs that they incur (and any costs order made against them) can be paid out of the funds of the charity. The trustees of an unincorporated charity can only pay those costs from the charity’s funds if they have been properly incurred

Option 1: wide-ranging reform

This is the preferred option.

Transitional costs

1. Familiarisation costs

Familiarisation costs to charities: all the proposed changes are for 'elective' charity processes, rather than routine ones. This means that they relate to specific activities that charities usually seek professional advice to do, such as disposing of charity land, changing governance documents and using permanent endowment. We do not therefore anticipate any transitional costs to trustees and charities because there will be no change to the day-to-day running of charities.

Familiarisation costs to professional advisers: Lawyers, judges, and other professionals are required to stay up to date with changes to areas of the law in which they practice. Charity lawyers and judges will therefore need to ensure that they have a comprehensive understanding of how the reforms operate, which will require them to become familiar with the reforms. In addition, property lawyers, RICS surveyors and fellows of the National Association of Estate Agents (“NAEA”) and the Central Association of Agricultural Valuers (“CAAV”) who deal with charity land will also want to become familiar with the reforms relating to land transactions. Familiarisation is likely to be either by attending training and/or reading the Act and Explanatory Notes (and associated revised guidance).

To the need for training, the Report and Explanatory Notes to the draft Bill explain how the reforms are to operate. It is expected that much, if not all, of any training costs will be absorbed through (a) the existing continuing professional development (“CPD”) requirements of solicitors, barristers, legal executives, RICS surveyors and fellows of the CAAV and NAEA, and (b) the existing training programmes for judges. The relevant professional associations (such as the Charity Law Association) are likely to provide lectures and seminars on the reforms which lawyers will attend as part of their CPD requirements. If they were not attending training on these reforms, they would be likely to attend similar training on other developments in the law. As a result, **we do not anticipate additional professional training costs.**

2. Costs to the Charity Commission of implementing the reforms

The Law Commission’s recommendations will require the Charity Commission to revise some of its guidance to reflect the reforms,²⁸ in particular:

- CC7 Ex gratia payments by charities²⁹
- CC28 Sales, leases, transfers or mortgages: what trustees need to know about disposing of charity land³⁰
- CC11 Trustee expenses and payments³¹
- CC36 Changing your charity’s governing document³²
- CC34 Collaborative working and mergers: an introduction³³
- OG 545-1 Identifying and Spending Permanent Endowment
- OG 545-2 Expenditure and Replacement of Permanent Endowment
- OG 565 Disputes in Charities
- OG 98 Power of the Commission to relieve trustees, auditors, etc from liability for breach of trust or duty.

Implementation of our recommendations will therefore have resource implications for the Charity Commission. The Commission’s permanent staff who maintain the Commission’s existing guidance (and who draft new guidance) will be diverted from that task and instead concentrate on updating the Commission’s existing series of guidance to reflect new legislation. It might be necessary for the Commission to engage additional staff to prepare that updated guidance, but that will depend on the timeframe for implementation.

If enough lead-in time is given, the Commission might be able to prepare revised guidance utilising its existing staff. If that is the case, the cost will be an opportunity cost since the Commission’s existing staff will be diverted away from other tasks in order to prepare the updated guidance, and will be unable to undertake general maintenance of the guidance.

The cost to the Commission of preparing updated guidance has not been monetised in this De Minimus Assessment. The Commission will need to undertake some scoping work, and to discuss with Government the likely timeframe for implementation, in order to estimate the likely resource implications for updating its guidance. In making that estimate, the Commission will be able to draw on its experience of preparing guidance following the implementation of the Charities (Protection and Social Investment) Act 2016, albeit the nature of the reforms in that Act are very different from those in the Law Commission’s Bill.

²⁸ Other guidance would also have to be updated to reflect the reforms to address other problems that are not addressed in this Impact Assessment: see p 6-7.

²⁹ And associated OG 539 Ex-gratia payments by charities.

³⁰ And associated OG 548 Disposal of charity land; OG 546 Restrictions on Mortgages and other Borrowing; Selling or leasing charity land for less than best price.

³¹ And associated OG 515-2 The statutory power to pay for services provided by a trustee.

³² And associated OG 518 Alterations to governing documents: Charitable Companies; OG 519 Unincorporated Charities: Changes to Governing Documents and Transfer of Property (Charities Act sections 268, 275 and 280); OG 2 Application of property cy-près; OG 715-4 CIO: Transferring the assets of an unincorporated organisation to a CIO; OG 500 Schemes; Royal Charter charities.

³³ And associated OG 50 Incorporations of charity trustees; OG 60 Register of charity mergers: sections 305-314 of the Charities Act 2011; Making mergers work: helping you succeed; OG 38 Corporate trustees.

Benefits

Transitional benefits

There are no identified transitional benefits to any of the recommendations.

Ongoing benefits

Non-monetised benefits

1. Certainty and flexibility

The Law Commission's recommendations will result in increased certainty and clarity in the law, which will benefit charity trustees, legal and other professionals, the Charity Commission and the Charity Tribunal.

2. Deregulation and rationalisation

The recommendations aim to remove unnecessary regulation and instead give charities wider or additional powers, so that they are not required to spend disproportionate amounts of time and money overcoming unnecessary and disproportionate bureaucratic hurdles.

3. Increased public trust and confidence in charities

A secondary, knock off outcome is that the recommendations will free up charities' resources to be spent in direct furtherance of their charitable purposes. This will help to increase public trust and confidence in charities, which may then encourage more donations.

Problem 1: Inconsistent and unnecessarily bureaucratic mechanisms for amending governing documents and changing purposes

(1) Summary of the problem and current law

Current law

All charities, whatever their legal form, have a governing document, which is the rulebook for the charity. Over time a charity may need to amend its governing document for a variety of reasons, ranging from minor technical changes to fundamental changes in the way the charity is run or the charitable purposes that it pursues. The amendment procedures available to a charity depend on its legal form: the Charities Act 2011 treats incorporated charities³⁴ differently from unincorporated charities,³⁵ and charities governed by Royal Charter and by Act of Parliament are subject to special regimes.

The mechanisms available to charities for changing their purposes are summarised in Table 2 below.

Table 2: Means of amending governing documents depending on legal form

Legal form	Mechanisms available
Unincorporated charities	Changing purposes <u>Annual income < £10,000 and do not hold "designated land"</u> : ³⁶ section 275 of the Charities Act enables such charities to pass a resolution to change their purposes. The charity trustees must send a copy of the resolution to the Charity Commission. <u>Annual income > £10,000 and/or hold "designated land"</u> : such charities are required to obtain a cy-près scheme from the Charity Commission. Other amendments

³⁴ Charities with a legal personality separate from their trustees or members.

³⁵ Charities with no separate legal personality.

³⁶ Charities Act 2011, s 275(1). Namely land held on trusts stipulating it must be used for the purposes of the charity, for example, a village hall may be held as "designated land".

	<p><u>Section 280 of the Charities Act</u>: enables certain administrative amendments to be made by resolution without any Charity Commission oversight.</p> <p><u>Amendments which do not fall within section 280</u>: charities are required to apply to the Charity Commission for an administrative scheme to effect the change.</p>
Charitable companies and CIOs	<p>Unregulated amendments Pass a resolution at a general meeting.³⁷</p> <p>Regulated alterations³⁸ Pass a resolution at a general meeting, having obtained the consent of the Charity Commission.</p>
Statutory and Royal Charter charities	<p>Statutory charities Ask the Charity Commission to draft a scheme to be approved by Parliament under section 73.</p> <p>Royal Charter charities Ask the Privy Council to approve amendments or to grant a supplemental Charter.</p>

Problems

For unincorporated charities, there is uncertainty as to what changes can be made using the existing power in section 280, and changes can sometimes only be made by obtaining a scheme from the Charity Commission. Moreover, where the change is to the charity's purposes there are limited circumstances in which the Charity Commission can make a scheme (set out in section 62 of the Charities Act 2011).

The Law Commission consultation reveals that schemes are unpopular with charities: they are criticised for being complex, expensive and time consuming. Many charities abandon their proposed change when faced with the process, opting instead to continue using out of date and inappropriate governing documents or to adopt expensive or inconvenient "workarounds" to the underlying problem.

Unincorporated charities have sometimes transferred their operations to a charitable company in order to be subject to the more flexible regime for companies. This is administratively expensive; unincorporated charities should be given similar flexibility to companies. These findings from the Law Commission have also been reiterated in government's informal consultation with stakeholders.

The uncertainty concerning the scope of section 280 and the need to obtain schemes from the Charity Commission creates unnecessary bureaucracy in the process, which can reduce the time available to the charity's trustees and staff for the pursuit of the charity's mission. It can delay beneficial changes coming into effect, and it can impose burdens on third parties. Increased expense in the process reduces the funds available for the charity to spend directly in the furtherance of its purposes. The law should allow changes to governing documents to be made quickly and efficiently, whilst retaining safeguards to ensure that amendments are appropriate.

The amendment procedures are worse for statutory and Royal Charter charities. They can involve various bodies (the Privy Council, the Charity Commission, DCMS and Parliament) and they have been criticised for being long, bureaucratic and expensive. For example, the process of getting a scheme approved by Parliament can take several years.

³⁷ Companies Act 2006, s 21 (charitable companies); Charities Act 2011, s 224 (CIOs). A resolution must be passed by at least 75% of the members voting or, in the case of a resolution of the members of a CIO otherwise than at a general meeting, by unanimous agreement of the members: Companies Act 2006, s 283; Charities Act 2011, s 224(2).

³⁸ This includes an amendment to the charity's purposes.

Costs associated with Problem 1

The details of how these costs were calculated are at Appendix 1. For the purposes of completeness, all staff costs have been uplifted by 22% to take account of non-wage related costs.

Cost associated with unincorporated charities making administrative schemes to amend governing documents

The costs arise from Charity Commission staff costs and solicitors' costs for charities.

- Cost per year to Charity Commission - £51,500
- Cost per year to charities - £281,400
- Total cost per year - £333,000

Costs associated with corporate charities amending their governing documents

The costs arise from Charity Commission staff costs and solicitors' costs for charities. The costs shown below are for 'unregulated' and 'regulated' alterations. Only regulated alterations require Charity Commission time. We were unable to find data about the number of unregulated alterations made per year because they do not require Charity Commission approval, so the costs shown below are estimates for individual instances of alterations.

- Cost to Charity Commission of approving a regulated alteration - £48
- Cost to charity of making a regulated alteration - £856
- Cost to a charity of making an unregulated alteration - £642

Costs associated with statutory charities and Royal Charter charities amending their governing documents

The costs arise from the staff costs at the Privy Council, charities and solicitors' costs for charities. However there was insufficient evidence to make a meaningful estimate of costs as numbers of alterations are very low and estimates of time required varied widely.

(2) Options considered to solve the problem

Option 1: wide-ranging reform

This is the preferred option. Both elements 1(a) and 1(b) require primary legislation.

Option 1 would address deficiencies in the current law through a combination of: legislative reform modifying provisions that are not operating efficiently; non-legislative reform to remove archaic processes; and new guidance to support these reforms. As some of these deficiencies stem from the existing legislation itself, primary legislation is the only option available to address those. However, this would be supported by non-legislative reform, in the form of new guidance and a recommendation that the Privy Council change its procedure.

Option 1 would involve implementing the following four recommendations.

- Recommendation 1(a): a new statutory power for unincorporated charities to amend provisions in their governing documents.

This reform is deregulatory: it amends the existing law to create a simplified mechanism by which unincorporated charities can amend their governing documents. The recommendation will align, as far as possible, the amendment regime for unincorporated charities with that for charitable companies. This would involve giving unincorporated charities a power to change any provision in their governing document by a resolution of trustees and/or members, save for a defined list of regulated alterations, which would require the Charity Commission's consent.

- Recommendation 1(b): a new statutory power for Royal Charter charities to amend provisions in their governing Charter.

This reform is deregulatory: it amends the existing law to simplify the procedure by which Royal Charter charities, without an express power of amendment in their constitution, can amend their governing

documents. The new power would allow Royal Charter charities (that do not have an express amendment power) to amend any provision in their Royal Charter subject to the amendment being approved by the Privy Council. This will reduce the need for supplemental Charters to be printed.

(3) Costs and benefits analysis

Option 1

Recommendation 1(a): a new statutory power for unincorporated charities to amend provisions in their governing documents

Costs of reform

There are not expected to be any transitional or ongoing costs specific to this reform.

Benefits of reform

1. Monetised

A new statutory power for unincorporated charities to amend provisions in their governing documents will reduce the need for unincorporated charities to spend time and money in requesting administrative and cy-près schemes. Based on a sample taken of eight months, comprised of an extrapolated yearly figure of 98 Charity Commission schemes, it was estimated that under the current law, amendments to governing documents for which a scheme is required cost charities a total of £230,692 per year and the Charity Commission £42,252 per year. The sum of the yearly cost of administrative and cy-près schemes to charities and the Charity Commission was used to calculate the total yearly cost of using schemes to amend governing documents: see Appendix 1, Tables 26-29.

These amendments could instead be made under the Law Commission's recommended power, avoiding the need for a scheme. To calculate the total cost saving it was necessary to estimate the cost of making the same alterations under the proposed new power. In order to do this it was first necessary to identify how many amendments in the sample would be regulated or unregulated alterations under the new power (as there are different time and cost implications for each). The results of the analysis are set out in Tables 5 and 6.

Table 5: Number of regulated and unregulated alterations

	Regulated alterations only	Unregulated alterations only	Both regulated and unregulated alterations	Total
A. Raw data from sample	28	11	26	65
Estimated yearly total (12(A/8))	42	17	39	98

Table 6: Costs of making the same alterations under the new power

		Regulated alterations only	Unregulated alterations only	Both regulated and unregulated alterations	Total cost
A. Estimated yearly total ³⁹		42	17	39	
Cost per alteration ⁴⁰	B. To the Charity Commission	£48	£0	£48	
	C. To charities	£904	£642	£904	
Estimated yearly cost	D. To the Charity Commission (AB)	£2,016	£0	£1,872	£3,888
	E. To charities (AC)	£37,968	£10,914	£35,256	£84,138

³⁹ See Table 5.

⁴⁰ See Table 30 (best estimates).

The savings as a result of the new power are calculated by subtracting the total yearly cost to charities and the Charity Commission of making amendments under the new power (Table 6) from the total yearly cost to both of amending governing documents by scheme under the current law (Table 29). The results are set out in Table 7.

Table 7: Estimated cost savings under the new power⁴¹

	Charity Commission	Charities	Total
Yearly cost of amendments by scheme ⁴²	£42,000	£231,000	£273,000
Yearly cost of amendments under the new power ⁴³	£4,000	£84,000	£88,000
Savings	£38,000	£147,000	£185,000

The best estimate of annual savings is about £185,000 and the present value over 10 years is £1.6 million

Assumptions:

- The sample of eight months of Charity Commission schemes is representative of schemes made across the year (see Table 5).
- The cost of making regulated and unregulated alterations under the new power will be the same as the costs to corporate charities under the current law (see Appendix 1, Table 30).
- When a collection of amendments makes both regulated and unregulated alterations, the cost will be the same as for making a regulated alteration (the costs of the unregulated alteration being subsumed within the costs of the regulated alteration).

2. Non-monetised benefits

The Law Commission's recommendations will lead to closer alignment of the amendment powers between corporate and unincorporated charities. Closer alignment has the benefit of overall increased simplicity. However, more specifically, alignment is beneficial to charities, their lawyers and the Charity Commission as mistakes are less likely to be made as a result of confusion between the two regimes. This in turn reduces the costs to those parties in unpicking mistakes which charities have made.

The new statutory power will provide a clear and accessible mechanism for charities to amend their governing documents and change their purposes, instead of the current complicated procedures. It will remove the need for unincorporated charities to use workaround methods such as transferring their operations to a charitable company in order to benefit from a more flexible regime. Charities will be more likely to use the new power and make the necessary modifications rather than continuing to use out of date and inappropriate governing documents.

Recommendation 1(b): a new statutory power for Royal Charter charities to amend provisions in their governing Charter

Costs of the reform

There are not expected to be any transitional or ongoing costs specific to this reform.

Benefits of the reform

1. Monetised benefits

It has not been possible to monetise overall benefits. The Law Commission sought evidence on the current costs to Royal Charter charities but the anecdotal evidence was too varied to estimate a saving across the sector as a whole. The anecdotal evidence is included in Appendix 1. The new statutory power will always be cheaper than the existing procedures and will therefore result in a monetary benefit even if its value cannot be estimated here.

⁴¹ Throughout the De Minimus Assessment all estimated savings/costs (i.e. low, best and high) are rounded to the nearest £'000 unless otherwise stated, which may result in some rounding errors.

⁴² See Table 29 (best estimates).

⁴³ See Table 6.

2. Non-monetised benefits

The new statutory power for Royal Charter charities to amend provisions will reduce the delay involved under the current law, in particular by avoiding the need to obtain a supplemental Charter. This is because, under the new statutory power, amendments can be made by an Order in Council, which is a simpler process.

Problem 2: Substantial and unnecessary costs in land transactions

(1) Summary of the problem and current law

Restrictions on land transactions

Under Part 7 of the Charities Act, when charities sell land, grant a lease for more than seven years, or otherwise dispose of an interest in land, the trustees must generally obtain a detailed report from a member of the Royal Institution of Chartered Surveyors (“RICS”). The report must address a number of issues set out in the Charities (Qualified Surveyors’ Reports) Regulations 1992 (“the 1992 Regulations”). If the sale or lease is of “designated land” and the trustees do not intend to acquire replacement land, they must also give public notice of the proposed sale or lease and consider any representations made in response. Compliance with the requirements in all cases can cause charities to incur substantial and unnecessary professional costs and can cause delays in land transactions. The “one-size-fits-all” nature of the Part 7 regime means that these costs can often be disproportionate to the value of the transaction or complexity of the valuation. There are also various technical deficiencies in the legislation which add unnecessary expense to land transactions, for example, there are doubts as to whether a certificate of compliance with Part 7 can be delegated by the charity trustees.

Safeguards in the law are necessary in order to protect charities from disposing of land at an undervalue. However, the current legislation does not strike the right balance between providing flexibility for the trustees to dispose of land and ensuring that charity property is effectively protected.

Certificate of compliance

If trustees dispose of an interest in land without complying with the Land Disposal requirements, the transaction will be void, namely, treated as though it never took place. Purchasers from charities are protected by a certificate, which trustees must include in the document effecting the disposition (usually a conveyance), which means that the transaction will be valid whether or not the trustees actually complied with Part 7. However, an equivalent certificate in the contract agreeing to the disposition does not protect purchasers. Accordingly, any failure by the trustees to comply with Part 7 will result in the contract for the disposal of an interest in land being unenforceable.⁴⁴ This means that the purchaser could not oblige the vendor to comply with his or her obligation under the contract (usually to convey the land or interest in land). Currently, therefore, conveyancers for purchasers from charities should carefully check the RICS report obtained by the trustees to ensure that it complies with the 1992 Regulations which, in turn, ensures that the contract will be enforceable by the purchaser.

The Universities and College Estates Act 1925

For certain universities and colleges, disposals of land are governed by the Universities and College Estates Act 1925 (“the UCEA”). The UCEA requires the institutions to seek Ministerial consent from the Department for Environment, Food and Rural Affairs (“Defra”) for certain disposals of land. The Act itself is long, complicated and confusing, and some of the institutions therefore rely on powers within their own governing documents (if available) in preference to the UCEA. Charities incur additional legal costs in seeking to navigate the UCEA. Where it applies, the requirement to obtain Ministerial consent increases those costs and creates additional delay in land transactions. Furthermore, the requirement to obtain the Minister’s consent is inappropriate since there is no longer a policy need for Defra to provide universities and colleges regulated by the Act with consent to land transactions. There is also a risk for Defra that giving consent to a particular transaction could be viewed as granting planning permission or consenting to a development where that decision lays elsewhere.

⁴⁴ The problem is known as “the Bayoumi gap”, after the decision in *Bayoumi v Women’s Total Abstinence Union Ltd and another* [2003] Ch 283, [2002] EWHC 212, where the lacuna was revealed.

Costs associated with Problem 2

Detail of how these costs were calculated are set out in Appendix 2.

The largest cost arising are the costs of obtaining a RICS report for land transactions. The estimated cost of this to charities is £4,587,600. There are also additional legal costs associated with cross-checking the report's compliance with the detailed regulations. Since we have heard that there is divergent practice amongst conveyancers as to whether or not they would check the content of the vendor charity's report, it has not been possible to monetise these costs. The costs of the UCEA requirements arise from Defra staff costs and UCEA institutions' solicitors' costs. These are estimated at £6,700 and £103,700 per year respectively.

(2) Options considered to solve the problem

Option 1: wide-ranging reform

This is the preferred option. It has three strands. Only two strands - 2(b), requiring a certificate of compliance in the contract for the disposition and 2(c), a consolidated statutory power to deal with land for UCEA institutions - require primary legislation. Recommendation 2(a) can be achieved through secondary legislation.

Option 1 would address deficiencies in the current law through a combination of primary and secondary legislative reform, modifying and repealing existing provisions which are not working effectively. The deficiencies here stem from the existing primary and secondary legislation itself and therefore legislative reform is the only option available to address them.

Option 1 would involve implementing the following three recommendations.

- Recommendation 2(a): more flexible requirements when disposing of charity land

This reform is deregulatory: it amends the existing law to reduce the burden on charities of complying with the Charities Act in respect of certain land transactions by:

- (i) expanding the category of designated advisers qualified to give advice under the Charities Act to include fellows of the National Association of Estate Agents (NAEA) and Central Association of Agricultural Valuers (CAAV);
 - (ii) simplifying the relevant regulations (the '1992 Regulations' to allow designated advisers to decide which matters are relevant and how best to provide appropriate advice in reliance on their professional qualifications, standards and expertise; and
- Recommendation 2(b): requiring a certificate of compliance in the contract for the disposition

This reform: (i) introduces a protection for purchasers of charity land from the date of the contract for the disposition; and (ii) correspondingly creates an additional regulatory requirement for charities by requiring them to confirm compliance in a certificate in the contract (they are already required to provide a certificate addressing other matters).

- Recommendation 2(c): a new consolidated general statutory power to deal with land for UCEA institutions

This reform is deregulatory: it repeals the vast majority of the provisions of the UCEA and replaces them with a single consolidated power to deal with land. It also removes many of the burdens imposed by the Act, in particular the need to seek Ministerial consent.

(3) Costs and benefits analysis

Option 1

Recommendation 2(a): more flexible requirements when disposing of charity land

Costs of the reform

We do not expect there to be any transitional or ongoing costs specific to this policy.

Benefits of the reform

1. Monetised

Parts (i) to (ii) of Recommendation 2(a) would each result in cost savings, which are monetised separately here.

(i) Expanding the category of designated adviser

The estimated total cost to charities of obtaining a report from a RICS surveyor is £4,587,600 per year: see Appendix 2, Table 34. Recommendation 2(a)(i) will allow charities to obtain advice from fellows of the NAEA or CAAV where appropriate instead of from a RICS surveyor. Charities will benefit in cases where they are able to obtain advice from this expanded pool of advisers at a lower cost. In order to estimate what the cost saving will be, the number of charity land transactions for which advice could be sought from a fellow of the NAEA⁴⁵ rather than a RICS surveyor was estimated, and the difference between the costs of obtaining advice from those professionals calculated.

Transactions on which fellows of the NAEA could provide advice

It was necessary to estimate the number of transactions for which RICS reports are currently obtained, in which fellows of the NAEA could provide advice instead.

- Fellows of the NAEA, as estate agents, are unlikely to provide advice on the grant or surrender of easements, or the release of restrictive covenants, but such cases are likely to be negligible and therefore are not accounted for here.
- Fellows of the NAEA are most likely to provide advice in respect of transactions involving residential property. The number of dispositions of charity land involving residential property was estimated to be 5,187 each year: see Appendix 2, Table 33. It was estimated that in 1,297 of these cases the charity does not incur any additional cost because the estate agent will have a RICS surveyor available and wrap up the cost of seeking that advice in his or her commission. However, in all other cases the charity will incur the full cost of a RICS report, approximately £600.⁴⁶ Following the reform, estate agents will be able to provide advice even if they do not have a RICS surveyor available in branch or on call. It is difficult to predict exactly how the market will react to this change in the law. However, discussions with the NAEA suggest that in around 75% of cases where an estate agent is used, he or she will wrap up the cost of providing advice in his or her commission, and in the remaining cases will charge significantly less than a RICS surveyor: between £150 and £250. Table 9 sets out the estimated cost of seeking advice once the category of designated adviser has been expanded.
- Advice in respect of non-residential transactions (ie 3,756 transactions, being 42% of the 8,943 transactions which require advice each year)⁴⁷ will continue to be obtained from RICS surveyors, or CAAV members (who are likely to charge comparable fees).

Table 9: Cost of seeking advice under the new law

	Number	Cost of advice		Total cost
Non-residential transactions which will require a RICS report ⁴⁸	3,756	Low	£500	£1,878,000
		Best	£600	£2,253,600
		High	£800	£3,004,800
Residential transactions where cost of obtaining advice will be wrapped up in estate agent's commission ⁴⁹	3,890	0		0
Residential transactions where NAEA advice not wrapped up in commission ⁵⁰	1,297	Low	£150	£194,550
		Best	£200	£259,400

⁴⁵ We have focused on advice from a fellow of the NAEA because we believe that a fellow of the CAAV is likely to charge the same as a RICS surveyor.

⁴⁶ See Appendix 2.

⁴⁷ See Appendix 2, Tables 32 and 33.

⁴⁸ 42% of the 8,943 transactions each year which require advice to be obtained.

⁴⁹ 75% of the 5,187 residential transactions each year.

⁵⁰ 25% of the 5,187 residential transactions each year.

		High	£250	£324,250	
Total cost of seeking advice under the new law				Low	£2,072,550
				Best	£2,513,000
				High	£3,329,050

The cost savings following implementation of this reform was calculated by subtracting the cost of obtaining advice under the new law from that of obtaining advice under the existing law. This calculation is set out in Table 10.

Table 10: Cost savings from expanding the category of adviser

	Low estimate	Best estimate	High estimate
A. Cost of obtaining advice under the current law ⁵¹	£3,823,000	£4,588,000	£6,117,000
B. Cost of obtaining advice under the new law ⁵²	£2,073,000	£2,513,000	£3,329,000
Cost savings (A-B)	£1,750,000	£2,075,000	£2,788,000

The best estimate of annual savings is £2.08 million. The present value over 10 years is £17.9 million.

Assumptions:

- The biggest total costs will be for non residential transactions.
- Residential transactions will benefit most from the advice of a fellow of NAEA.
- The fee for an NAEA agent will be wrapped up in his or her commission in 75% of disposals of residential property which currently incur the cost of a RICS report. Therefore the cost of advice in these cases will be £0. Where the cost of advice is not wrapped up in an NAEA agent's commission it will be significantly less than the cost of a RICS report.
- The number of transactions per year is not expected to change significantly.

(ii) Simplifying the 1992 Regulations

Recommendation 2(a)(ii) simplifies the issues that a designated adviser's report must include. That will save time for both designated advisers themselves and for conveyancers acting for charities.

Designated advisers will save time because they will not have to carry out a detailed cross-checking exercise, and will not have to address expressly in their reports issues that are irrelevant but which are specified in the regulations and must therefore be included. In addition, advisers will no longer have to make amendments to their reports when their charity client's conveyancer identifies that the report does not comply with one or more of the requirements of the regulations and asks the adviser to issue a revised report.

A report might take around 4 - 8 hours to prepare⁵³ One stakeholder estimated that a RICS surveyor might save at least 30 minutes to 1 hour per valuation as a consequence of this reform.⁵⁴ Another thought that simplification of the regulations was unlikely to lead to any time saving for RICS surveyors because most issues in the current regulations would continue to be addressed in their written reports.⁵⁵

It is difficult to estimate the costs savings, since those who are able to predict any time saving cannot give an entirely disinterested view concerning the Law Commission's reforms (since the Law Commission's recommended reforms to widen the category of designated advisers and simplify the regulations will, inevitably, result in RICS surveyors losing some work). We conclude that simplification of the regulations will result in a reduction in time taken by RICS surveyors to prepare their reports; if RICS surveyors do not need to address certain matters, then in a competitive market surveyors will take

⁵¹ Appendix 2, Table 34.

⁵² Table 9.

⁵³ Based on the cost of reports set out in Table 9 and the hourly rates set out in Table 11

⁵⁴ Juliet Weston MRICS.

⁵⁵ Gerald Eve LLP.

advantage of that potential time saving. Taking a conservative approach, our best estimate is that the simplification of the regulations will save RICS surveyors 30 minutes in each case. In Table 11 below, we set out the costs savings for RICS surveyors arising from simplification of the regulations.

Table 11: Savings for RICS surveyors from simplifying the 1992 Regulations

	Low estimate	Best estimate	High estimate
A. Number of charity land transactions requiring advice under Part 7 which would be obtained from a RICS surveyor ⁵⁶	3,756		
B. Reduction in time taken by RICS surveyor to prepare a report	0.3	0.5	0.7
C. Cost per hour ⁵⁷	£60	£100	£200
Total (ABC)⁵⁸	£68,000	£188,000	£526,000

The best estimate of annual savings is £188,000. The present value over 10 years is £1.6 million.

Conveyancers for charities will also save time because they will not have to carry out a cross-checking exercise to ensure that their charity client's designated adviser has addressed all the matters set out in the regulations. And when advisers (currently surveyors) have provided a report which fails to address one or more issues in the regulations, the conveyancers will no longer have to take time to correspond with the adviser to explain how the problem should be rectified. In Table 12 below, we set out the costs savings for conveyancers arising from simplification of the regulations.

Table 12: Savings for conveyancers from simplifying the 1992 Regulations

	Low estimate	Best estimate	High estimate
A. Number of charity land transactions requiring advice under Part 7 ⁵⁹	8,943		
B. Reduction in time taken by conveyancer to check the report ⁶⁰	0.2	0.25	0.3
C. Cost per hour	£214		
Total (ABC)⁶¹	£383,000	£478,000	£574,000

The best estimate of annual savings is £478,000. The present value over 10 years is £4.1million.

In relation to the savings for both RICS surveyors and for conveyancers from simplification of the regulations, it is not possible to say on whom the benefit will fall. It will either be passed on to the charity vendor through a reduction in the professional fee they have to pay to their adviser/conveyancer, or alternatively (and particularly if the adviser/conveyancer charges a fixed-fee for the work) the benefit will fall on the advisers/conveyancers themselves, since the time saving will allow them to undertake other paid work.

⁵⁶ We recommend expansion of the category of designated adviser to include fellows of NAEA and members of CAAV, as well as members of RICS. Since members of NAEA and CAAV do not currently provide advice under Part 7, it cannot be said that there would be any time savings for them resulting from simplification of the 1992 Regulations (which they do not currently follow because they are not permitted to provide advice). The calculation is therefore limited to the costs savings for RICS surveyors. We estimated above that advice in respect of 58% of transactions would now be taken from a fellow of the NAEA. We therefore take 42% of the total charity land transactions (8,943), for which advice would continue to be obtained from RICS surveyors (or CAAV members): see Table 9.

⁵⁷ Surveyors' fees are generally charged on a fixed fee basis. Through discussions with Juliet Weston MRICS and Gerald Eve LLP, we have estimated the cost per hour based on average time spent to prepare a report. The cost will depend on various factors, such as the location of the property and the complexity of the transaction.

⁵⁸ Rounded to nearest £'000.

⁵⁹ See Appendix 2, Tab 32.

⁶⁰ Based on comments from the Charity Law Association ("CLA") Working Party, Veale Wasbrough Vizards LLP and Val James (solicitor).

⁶¹ Rounded to nearest £'000.

2. Non-monetised benefits

Reform will provide more flexibility when following the advice requirements for designated land and enable trustees to gain more suitable and tailored advice from the most appropriate adviser. In addition, the recommendation will open up the market for the provision of advice to charities, currently restricted to RICS surveyors, and enable others who are well-placed to provide advice in this context to do so.

Simplifying the regulations will make it easier for designated advisers to provide charities with advice, particularly those who are unfamiliar with providing advice under Part 7 of the Charities Act and are therefore unfamiliar with the prescriptive requirements for their written reports. The simplified regulations will allow advisers to be given clearer and more sensible instructions, and will yield reports that are likely to be better understood by vendor charities. It may also make it cheaper for charities to obtain advice, even when they continue to use RICS surveyors: since the simplified regulations summarise what a surveyor ought to be doing when providing normal valuation and marketing advice, surveyors will no longer have any reason to believe that there is something different about advice under Part 7 and so less risk of surveyors making an additional charge for the work.

The recommendations will streamline the current regime in order to ensure that the legal requirements applicable to a transaction are proportionate to the risks involved. Changes to the regulations will include a requirement for the adviser to self-certify that they have the appropriate expertise and experience and are independent. This will give charities additional confidence when carrying out complex land transactions.

Together, expanding the category of designated advisers, simplifying the regulations, will remove inflexible and indiscriminate requirements which can delay land transactions. Such delays can often jeopardise potentially lucrative land transactions.

Recommendation 2(b): certifying compliance at contract stage

Costs of the reform

There are not expected to be any transitional or ongoing costs specific to this reform. Although this recommendation is introducing a new requirement for charities to include a statement in the contract for disposition, this will not result in any additional costs for charities. A contract for the disposition of charity land already has to contain certain statements⁶² and this recommendation simply adds to that existing requirement.

In practice, charities are already required to have complied with Part 7 before contract (since the purchaser will demand this) so the reform simply requires the contract to state that fact.

Benefits of the reform

1. Monetised benefits

Recommendation 2(b) will avoid the need for conveyancers acting for purchasers from charities to have to check that the surveyor's report complies with the 1992 Regulations (which, as discussed above, will also be simplified). Since we have heard that there is divergent practice amongst conveyancers as to whether or not they would check the content of the vendor charity's report, it has not been possible to monetise the benefits from this reform.

2. Non-monetised benefits

Contracts for disposals of charity land will now be enforceable against charities, just as they are against other vendors. This recommendation will give purchasers added confidence when entering into a transaction with charities from the contracting stage, since charities would no longer be able to renege on a deal. For example, under a conditional contract, a purchaser may spend thousands of pounds seeking planning permission and sourcing finance before the contract is completed (and the purchase price will usually reflect the enhanced value of the land by reason of the planning permission that has been obtained by the purchaser). If, having obtained planning permission, the charity could then renege on the contract, the purchaser would suffer a significant financial loss: it is a "significant accident waiting to happen, made all the more likely because purchasers and their solicitors don't generally understand

⁶² Charities Act 2011, s 122.

what is a fairly exotic point ... and don't do the necessary due diligence".⁶³ The reform will prevent purchasers from becoming reluctant to transact with charities.

The reform will also avoid potential complicated litigation⁶⁴ arising from contracts that do not currently complete owing to a failure of the charity to comply with Part 7, with resultant savings in court time.

Finally, the reform will alert charity trustees to their duties under the Charities Act at an earlier stage in the process by having to state that the applicable legal requirements have been complied with.

Recommendation 2(c): a new general power for UCEA institutions

Costs of the reform

There are not expected to be any transitional or ongoing costs specific to this reform.

Benefits of the reform

1. Monetised

There will be savings for the Department for Environment, Food and Rural Affairs, as it will no longer have to respond to requests for authorisation from the UCEA institutions when dealing with land. Defra estimated that, based on an average of 18 applications per year,⁶⁵ its annual labour savings would be £6,700.⁶⁶

There will also be savings for the UCEA institutions as their lawyers will not have to spend time understanding, analysing and complying with the UCEA. There will be similar savings in legal costs for purchasers from UCEA institutions, whose conveyancers will no longer have to familiarise themselves with the UCEA. We set out the cost savings in Tables 13 and 14 below.

Table 13: Cost savings for UCEA institutions

	Low estimate	Best estimate	High estimate
A. Number of UCEA transactions requiring Defra consent each year ⁶⁷	18		
Additional solicitor costs	B. Cost per hour	£214	
	C. Hours worked ⁶⁸	7	8
Total cost (ABC)	£27,000	£31,000	£35,000
D. Number of UCEA transactions that do not require Defra consent each year ⁶⁹	100		
Additional solicitor costs	E. Cost per hour	£214	
	F. Hours worked ⁷⁰	2	2.5
Total cost (DEF)	£43,000	£54,000	£64,000
Total costs to UCEA institutions (ABC + DEF)	£70,000	£85,000	£99,000

Table 14: Cost savings for purchasers from UCEA institutions

	Low estimate	Best estimate	High estimate
A. Number of UCEA transactions each year	118		

⁶³ CLA Working Party.

⁶⁴ The CLA Working Party said that litigation might concern, for example, whether there was a breach of warranty of authority, or whether there was any personal liability on the trustees to the purchaser for breach of statutory duty.

⁶⁵ The mean number of 18 applications per year; Defra received 17 applications in 2013, 16 in 2014 and 21 in 2015.

⁶⁶ This is based on an average application requiring five hours of Administrative Policy Officer time, two hours of Grade 7 lawyer time, three hours of Senior Executive Policy Officer time and 1.5 hours of Grade 7 Policy Official time.

⁶⁷ Defra received 17 applications in 2013, 16 in 2014 and 21 in 2015.

⁶⁸ Namely, the extra costs of the transaction for the seller by reason of it (1) being a UCEA transaction and (2) needing Defra consent. Best estimates, based on discussions with stakeholders.

⁶⁹ Best estimates, based on discussions with stakeholders.

⁷⁰ Namely, the extra costs of the transaction for the seller by reason of it being a UCEA transaction. Best estimates, based on discussions with stakeholders.

Additional solicitor costs	B. Cost per hour	£214		
	C. Hours worked ⁷¹	1	1.5	2
Total costs to purchasers from UCEA institutions (ABC)		£25,000	£38,000	£51,000

The best estimate of total annual savings for Defra, UCEA institutions, and purchasers from UCEA institutions is £129,700. The present value over 10 years is £1.1 million.

The new general power will require the UCEA institutions to comply with the requirements in Part 7, in particular to obtain advice (unless an exemption applies). However, it is estimated that this will not result in any net increase in costs to the UCEA institutions since most will follow the requirements in Part 7 as a matter of good practice (and, if Defra consent is needed, because Defra will insist on them doing so).⁷² Moreover, the recommendations above concerning Part 7 will reduce the costs of compliance with Part 7.

2. Non-monetised benefits

The UCEA institutions and Defra will benefit from reduced bureaucracy as they will no longer have to comply with the long and complicated provisions of the UCEA. Furthermore, the legal regime will become more consistent and up to date.

Reform will also address the current anomaly under which Defra is the responsible department for giving consents under the UCEA, despite it no longer having a policy interest in making decisions about land transactions by charities regulated by the Act. Furthermore, removing the need to obtain Defra consent to transactions will avoid the delay that the process currently adds to land transactions. Such delays can jeopardise transactions that are potentially of significant financial benefit to the institutions concerned.

Option 2d

Costs of the reform

As for recommendations 2(a)(i) and (ii).

Benefits of the reform

As for recommendations 2(a)(i) and (ii).

Table 15: Problem 2: Annual cost-benefit and NPV summary (million)

Option 1	Low estimate	Best estimate	High estimate
Cost	£0	£0	£0
Benefit	£2.30	£2.87	£4.04
NPV over 10 years	£19.14	£23.86	£33.62
Option 2	Low estimate	Best estimate	High estimate
Cost	£0	£0	£0
Benefit	£2.20	£2.74	£3.88
NPV over 10 years	£18.30	£22.79	£32.33

⁷¹Namely, the extra costs of the transaction for the purchaser by reason of it being a UCEA transaction. Best estimates, based on discussions with stakeholders.

⁷²Based on discussions with the UCEA institutions.

Problem 3: Uncertain treatment and inflexible use of permanent endowment

(1) Summary of the problem and current law

Permanent endowment is property belonging to a charity that it cannot spend. It can be divided into:

11. “Functional” permanent endowment: permanent endowment which is used by a charity directly to pursue its purposes. Examples include village halls and recreation grounds. The charity might be able to sell the property and purchase other property that performs the same function, but it cannot spend the proceeds of sale in carrying out its day-to-day activities.
12. “Investment”, or “non-functional”, permanent endowment: a fund which must be invested by the charity (for example in shares, bonds and other securities) to produce an income. The income, but not the fund itself, can be spent on the charity’s day-to-day activities.

The problems in the law fall broadly into two categories set out below.

(i) Uncertainty concerning the release of permanent endowment restrictions

Charities might wish to spend some or all of their permanent endowment; for example, the fund might be so small that the costs of administering it are disproportionate to the income that it yields. There are existing statutory powers for unincorporated charities to spend permanent endowment in sections 281 and 282 of the Charities Act 2011. Before exercising the powers, the charity trustees have to be satisfied that the purposes set out in the trusts to which the fund was subject could be carried out more effectively if the capital, or the relevant portion of the capital, could be spent.⁷³

Section 281 allows trustees to spend permanent endowment if the value of the fund is less than £10,000 or if the charity’s annual income is less than £1,000. Otherwise, the charity must follow the procedure in section 282 and gain the consent of the Charity Commission. There is confusion regarding whether the financial thresholds apply to the income and capital of the permanent endowment fund alone or whether they also include the charity’s other income and capital. Additionally the ratio in the financial thresholds between capital (£10,000) and income (£1,000) are inappropriate; a fund of £50,000 might yield an income of under £1,000, so could fall within section 281 despite the capital value far exceeding the £10,000 threshold.

(ii) Inflexibility concerning the use of permanent endowment

Rather than spending permanent endowment, charities might instead want to use permanent endowment in new or flexible ways, where the value of the fund is not expected to diminish in the long term. For example, charities might wish to borrow from their permanent endowment, but to do so they must obtain an order or scheme from the Charity Commission. Or the charity might want to use permanent endowment to make a social investment.

Permanent endowment and social investments

A social investment is a transaction through which a charity both directly furthers its purposes and achieves some financial return.⁷⁴ It can be an efficient way for charities to achieve their purposes and recycle their money. If a social investment is expected to decrease in value (that is, to have a negative financial return), it cannot be made using permanent endowment even if it is in the interests of the charity to do so. This is despite the expected benefit it would deliver to the charity’s mission and the fact that any losses are expected to be offset by other assets in the portfolio. In general, trustees can invest a £10,000 permanent endowment fund in a social investment that is expected to preserve its capital value and yield an income of £1. But (unless they release the spending restrictions altogether) they cannot use that £10,000 permanent endowment fund to invest £5,000 in a social investment that is expected to be sold the following year for £4,900 even if they expect to offset that £100 loss through another £5,000

investment that is expected to be sold the following year for £6,000. The position is out of step with the facilitation of social investment introduced by the Charities (Protection and Social Investment) Act 2016.

⁷³ Charities Act 2011, ss 281(4) and 282(3).
⁷⁴ Charities Act 2011, s 292A.

Costs associated with Problem 3

Details about how the costs associated with Problem 3 were calculated are set out in Appendix 3.

An application to release a charity's permanent endowment under the more complex section 282 route costs approximately £40 in Charity Commission staff time plus an additional £80 of lawyer time in some more complex cases. It has not been possible to establish how many charities use the more time-consuming section 282 route to release their permanent endowment.

An application to borrow from permanent endowment costs approximately £20 in Charity Commission staff time with some more complex cases requiring additional legal input costing approximately £80. We do not have figures for the associated costs for charities. We anticipate that the confusion presented by the current thresholds increases the amount of solicitor time required.

(2) Options considered to solve the problem

Option 1: Wide-ranging reform

This is the preferred option. It requires primary legislation.

Option 1 would address deficiencies in the law through primary legislative reforms, which would modify existing provisions which are not operating effectively and introduce new provisions to increase flexibility. The problems here stem from the legislation itself and can therefore only be addressed through primary legislative reform.

Option 1 would require implementation of the following two recommendations.

- Recommendation 3(a): clearer and broader powers to release permanent endowment restrictions

This reform is deregulatory: it will simplify the procedures for spending permanent endowment. The availability of the power in section 281 (to release permanent endowment restrictions without Charity Commission consent) would depend only on the value of the permanent endowment and not relate to the charity's income. Furthermore, the power would be available in respect of funds of a value up to £25,000. This will mean that a wider range of charities can use this more straightforward procedure instead of having to seek Charity Commission consent (under section 282).

- Recommendation 3(b): new statutory powers to borrow from, and invest, permanent endowment

This reform is deregulatory: it creates a new statutory power which will enable charities to release temporarily restrictions on part of their permanent endowment fund in order to be able to borrow from it, or invest more flexibly.

The recommendations would enable trustees to borrow from their permanent endowment, subject to recoupment, without having to obtain authorisation from the Charity Commission. In addition, trustees would be given a power to resolve that permanent endowment restrictions be released in order to permit them to make social investments with a negative or uncertain financial return. The two powers would be useful additions to trustees' powers. The first would allow trustees to borrow from their permanent endowment for any reason in seeking to carry out the charity's purposes and make social investments with a negative financial return provided they replenished any losses. The second power, which is limited to social investment, would allow trustees to engage in portfolio offsetting⁷⁵ without having to recoup any actual losses.

The measures which increase the threshold above which Charity Commission must be sought to release spending restrictions on permanent endowment are part of a wider measure to clarify the current law, which produces results that are uncertain, complicated, illogical and arbitrary. The new threshold is that permanent endowment funds with a value of up to £25,000, up from £10,000. The threshold is significantly lower than the £100,000 threshold proposed by Lord Hodgson in his original report, and lower than the £1 million threshold proposed by the main charity representative bodies (NVCO, the Association of Charitable Foundations, the Institute of Fundraising and the Charity Finance Group) in their response to the Law Commission's consultation, and is also capable of amendment by secondary legislation in the event that the evidence of its operation shows that the threshold is not set at an appropriate level to achieve the law's aims.

⁷⁵ Portfolio offsetting means using investment permanent endowment to make social investments that are expected to lose money (that is, pay back less than the initial outlay) in circumstances where the trustees expect to offset any losses by gains elsewhere in the portfolio.

(3) Costs and benefits analysis

Options 1

Recommendation 3(a): clearer and broader powers to release permanent endowment restrictions

Costs of the reform

There are not expected to be any ongoing or transitional costs specific to this reform.

Benefits of the reform

1. Non-monetised benefits

It has not been possible to monetise the overall benefits stemming from charities no longer having to seek Charity Commission consent under section 282 in order to release their permanent endowment. However, a proportion of the costs to the Charity Commission, identified in Appendix 3, will be saved as a result of an increase in the number of charities able to use section 281 instead of seeking consent under section 282. There will also be reduced legal costs for charities with consultees reporting that section 281 costs much less as lawyers only need to advise on the resolution and process itself rather than corresponding with the Charity Commission. However, the available evidence is not sufficient to estimate an overall saving for the sector as a whole.

Reform would simplify and rationalise the law governing when permanent endowment can be released. This will bring the legal position into line with the charity sector's expectations by removing the anomalous and artificial £10,000 and £1,000 limits which can be misleading regarding the value of the fund that is subject to Charity Commission oversight.

Recommendation 3(b): new statutory powers to borrow from, and invest, permanent endowment

Costs of the reform

There are not expected to be any transitional or ongoing costs specific to this reform.

Benefits of the reform

1. Non-monetised benefits

It has not been possible to monetise the overall benefits stemming from this reform. There is no evidence available as to the number of applications by charities to the Charity Commission to borrow from their permanent endowment. However, a proportion of the costs, identified in Appendix 3, of considering and responding to section 105 orders or drafting a scheme will be saved as charities will be able to borrow a limited amount from their permanent endowment without consent. Similarly, the new power will be more cost effective for charities as the new power would require less involvement from legal professionals.

There will be important benefits stemming from charities being able to invest more flexibly, in particular from the ability of charities to make social investments as the purpose of these is to further, at least in part, a charitable purpose. Similarly, the ability to engage in portfolio offsetting will enable charities to make investments in furtherance of their purposes without having to focus solely on making a financial return. The power to borrow from permanent endowment could enable small charities with low income but significant endowment funds to make necessary expenditure, for example, fixing the roof on the village church.

Problem 3: Annual cost-benefit summary

As it has not been possible to monetise any costs or benefits in relation to Problem 3, no annual cost-benefit summary is available.

Problem 4: Gaps in legal provision for payments to charity trustees and other non-beneficiaries

(1) Summary of the problem and current law

The duties on charity trustees usually preclude them from receiving benefits from the charity or making payments they feel morally obliged to make. As the law recognises, imposing such duties on trustees is generally a good thing, but can cause problems. Existing solutions, however, can cause charities to incur disproportionate costs.

Remuneration for the supply of goods

Section 185 permits a charity to authorise what would otherwise amount to a breach of fiduciary duty by paying reasonable remuneration to a trustee for the provision of services to the charity, for example, building or accountancy services. There is, however, no equivalent power to authorise remuneration for the supply of goods, despite the fact that it can be advantageous to the charity for a trustee to supply goods to it. Many charities have therefore included a provision authorising remuneration for the supply of goods in their governing documents. A charity without such a provision that wishes to pay a trustee for the supply of goods either has to amend its governing document or obtain prior authorisation from the Charity Commission; both of these procedures can be burdensome and disproportionate to the value of the proposed remuneration.⁷⁶

Equitable allowances

Trustees have a duty not to profit by virtue of their position as a trustee. Therefore, when a trustee has been paid remuneration, or received a benefit in respect of work done for the charity, without appropriate authorisation, the trustee must pay back that remuneration to the charity (“account” for the profit). Nor can a trustee be remunerated in respect of work already done for the charity. In some circumstances, it might be appropriate for the trustee to retain a benefit, or to be paid for the skill and effort employed in carrying out work for a charity: an “equitable allowance”. Only the court can award an equitable allowance. Such awards are rare, in part due to the time and expense involved in court proceedings.

The Charity Commission has a statutory power to relieve a charity trustee from liability for breach of trust where the trustee has acted honestly and reasonably and ought fairly to be excused from liability.⁷⁷ However, this power does not enable the Commission to relieve a trustee from liability to account for a profit made in breach of fiduciary duty (nor to authorise a payment for the skill and effort employed in carrying out work for the charity).⁷⁸ Instead, if trustees do not want to go to court, they must rely on a written indication from the Commission that it will not pursue the trustee in respect of the unauthorised profit and nor will it pursue the charity and the other trustees for not taking action against the trustee.⁷⁹ This confirmation does not, however, provide finality or certainty as it will not stop someone else taking issue with the unauthorised profit.

Ex gratia payments

An ex gratia payment is a payment out of charity funds that the trustees feel morally obliged to make, but for which there is no legal basis.⁸⁰ Such cases typically arise in the context of the administration of wills when a charity’s legal entitlement to certain property does not reflect the true intentions of the testator. A charity cannot make an ex gratia payment without prior authorisation.

⁷⁶ While this burden may be reduced by the new power to amend governing documents (Recommendation 1(a)) it will still be disproportionate to amend the governing document for a one-off remuneration.

⁷⁷ Charities Act 2011, s 191.

⁷⁸ The Charity Commission takes the view that s 191 of the Charities Act 2011 only empowers the Commission to relieve a charity trustee from liability to compensate for a loss suffered by the charity and does not extend to liability to account for an unauthorised profit: Charity Commission, OG 98 A1 Power of the Commission to relieve trustees, auditors, etc from liability for breach of trust or duty (14 March 2012) para 1.4.

⁷⁹ See also Charity Commission, Ex gratia payments by charities – case studies (May 2013) p 2.

⁸⁰ *Re Snowden* [1970] Ch 700, 709, Cross J. An ex gratia payment can either be a waiver of rights to money or property to which the charity is legally entitled but has not yet received, or a payment of money or transfer of property out of the charity’s funds; see Charities Act 2011, s 106(2) and Charity Commission, CC7 Ex gratia payments by charities (May 2014) p 2, available at <https://www.gov.uk/government/publications/ex-gratia-payments-by-charities-cc7>. We refer to the guidance as “CC7”.

The ability of the court or the Attorney General to authorise ex gratia payments was established in *Re Snowden*.⁸¹ The Charity Commission has an equivalent jurisdiction by virtue of section 106 of the Charities Act 2011. Section 106 provides that the Charity Commission can exercise the same power as the Attorney General to authorise an ex gratia payment where the charity trustees “have no power to take the action, but ... in all circumstances regard themselves as being under a moral obligation to take it”.⁸² However, requiring authorisation before ex gratia payments are made is time-consuming and can involve costs which are disproportionate to the value of the payment itself.

Costs associated with Problem 4

The details about how the costs of Problem 4 were calculated are set out in Appendix 4.

The costs of this problem arise from Charity Commission staff costs for approving payments to trustees for goods and ex gratia payments; court costs for approving equitable allowances; and charities’ solicitors’ costs for all approval processes.

- Charity Commission staff costs for approving payments to trustees for goods - £34 per approval
- Charity solicitors’ costs for seeking approval for payments to trustees for goods - £1,600 per approval
- Charity Commission staff costs per year for ex gratia payments - £7,000 per year
- Charity solicitors’ costs for seeking approval for ex gratia payments - £34,500

The costs of seeking an equitable allowance from the court have not been calculated because such cases are extremely rare and vary widely in their complexity.

(2) Options considered to solve the problem

Option 1: Wide-ranging reform

This is the preferred option. It requires primary legislation.

Option 1 would address deficiencies in the law through primary legislative reform, creating new statutory mechanisms and powers to authorise the types of payments described above. These new mechanisms and powers can only be created through primary legislation and therefore primary legislative reform is the only option available.

Option 1 would require implementation of the following three recommendations.

- Recommendation 4(a): a new statutory mechanism for the authorisation of remuneration of trustees for the supply of goods.

This reform is deregulatory: the new statutory mechanism is less burdensome than the existing processes for authorising remuneration for the supply of goods. The new mechanism will correct the inconsistency between trustees that supply services and trustees that supply goods to a charity. Often a trustee can provide goods on more favourable terms than the charity could obtain elsewhere.

- Recommendation 4(b): a new statutory power for the Charity Commission to award equitable allowances.

This reform is deregulatory: it removes the burden of charities having to go to court to seek an equitable allowance and enables them to apply instead to the Charity Commission, a less costly and burdensome process. The power will permit the Charity Commission to award equitable allowances in situations where charity trustees would otherwise have to repay any remuneration that they have received, or where they deserve payment for the work and skill in producing a benefit for a charity.

- Recommendation 4(c): a new statutory power for trustees to make small ex gratia payments.

This reform is deregulatory: it reduces the burden on charities seeking to make small ex gratia payments as they will no longer be required to obtain prior authorisation from the Charity Commission, Attorney General or court. This will provide certainty and clarity to trustees, by putting the current informal practice of making certain payments without authorisation on a statutory footing, but also expanding it to allow larger payments in the case of larger charities.

⁸¹ See n 106.

⁸² Charities Act 2011, s 106(1). There is a general power for the Charity Commission to authorise any proposed action which is “expedient in the interests of the charity” under s 105. In some cases, an ex gratia payment will be expedient in the interests of the charity and could therefore be authorised under this general power (*Re Snowden*, at 709, Cross J). But s 106 is a specific and tailored power for ex gratia payments alone, without a requirement that payments are expedient in the interests of the charity.

Table 1: Threshold for ex gratia payments according to charity size

Income	Threshold
Up to £25,000	£1,000
Above £25,000 and up to £250,000	£2,500
Above £250,000 and up to £1 million	£10,000
Above £1 million	£20,000

These income bands are well known by registered charities since they dictate the charity's reporting and accounting requirements. Setting the threshold by reference to the broad categorisation of a charity's income would provide proportionate regulation and oversight of ex gratia payments, whilst remaining sufficiently simple for charities to apply. We acknowledge that these thresholds will produce some arbitrary results; a charity with an income of £25,000 will be permitted to make an ex gratia payment of up to £1,000 without oversight, whereas a charity with an income of £25,001 will be permitted to make a payment of up to £2,500. But that is an inevitable consequence of thresholds and it occurs elsewhere in the Charities Act 2011.

With regard to the maximum payment thresholds that we recommend, we consider that the lowest threshold should reflect the informal threshold already applied by the Charity Commission, and should therefore be £1,000. We also recommend that the upper limit should be £20,000, as we think any inappropriate payment over this level could cause significant reputational damage to a charity, regardless of its size. The thresholds in between (those of £2,500 and £10,000) constitute 1% of the upper limit of the income band.

(3) Costs and benefits analysis

Option 1

Recommendation 4(a): a new statutory mechanism for the authorisation of remuneration of trustees for the supply of goods

Costs of the reform

There are not expected to be any transitional or ongoing costs specific to this reform.

Benefits of the reform

1. Monetised benefits

The creation of a new statutory provision will permit charities to source goods from trustees which they would otherwise have sought elsewhere for fear of breaching trustee duties. This will result in savings for charities as trustees are likely to offer more favourable terms than alternative suppliers of goods who have no connection to the charity. These savings are potentially significant but are not readily quantifiable since they will depend on the nature of the particular goods in question, which could range from pencils to paint to portacabins. Moreover, the saving that the charity will be able to make by sourcing those goods from a trustee will differ in each case.

2. Non-monetised

It has not been possible to monetise the overall benefit of this reform as there is no evidence of the number of applications for the authorisation of remuneration of trustees for the supply of goods.

However, some of the costs to charities and the Charity Commission identified in Appendix 4, Table 35, will be saved as Commission authorisation will no longer be required under the new mechanism.

This recommendation will result in increased certainty for trustees. Trustees will have a defined set of circumstances in which they are able to authorise the remuneration of trustees for the supply of goods, without having to amend their governing documents to create an express provision authorising remuneration. This will save the time and expense associated with amending governing documents. Additionally it will create consistency between how the supply of services and goods are treated.

Recommendation 4(b): a new statutory power for the Charity Commission to award equitable allowances

Costs of the reform

There are not expected to be any transitional or ongoing costs specific to this reform.

Benefits of the reform

1. Non-monetised benefits

It has not been possible to monetise the overall benefit of this reform. However, there will be savings for the Charity Commission as it will no longer have to assess and explain the current complicated practical solution to its inability to authorise equitable allowances. It reported one recent, relatively complex case requiring between 15 and 20 hours of lawyer time, valued at between £600 and £800 (based on a cost to the Charity Commission of £40 per hour), plus two hours of time from a more senior lawyer, valued at £100 (based on a cost of £50 per hour). However, owing to the fact that such cases are very rare and vary widely, the Charity Commission was unable to provide us with an average cost. Furthermore the reform will avoid the time, effort and expense involved in the trustees pursuing court proceedings.

The main benefit of this reform is increased certainty for charities and trustees who will no longer have to rely on an indication by the Charity Commission that formal proceedings will not be pursued. The power will improve transparency and clarity in the Charity Commission's dealings with requests for equitable allowances.

The reform will also remove the current mismatch between what action the court can take in response to the unauthorised payment of a trustee and what action the Charity Commission can take. The Commission is currently limited to relieving trustees from the consequences of a breach of trust, but it cannot go as far as the court in authorising an equitable allowance in respect of work they have done or a benefit they have received.

Recommendation 4(c): a new statutory power for trustees to make small ex gratia payments

Costs of the reform

There are not expected to be any transitional or ongoing costs specific to this reform.

Benefits of the reform

1. Monetised

The Law Commission's recommendations will permit trustees to make ex gratia payments without Charity Commission authorisation when the payments fall under certain thresholds. These thresholds are set out in Table 16. The power will avoid the costs and delays in obtaining prior authorisation from the Charity Commission when the payments are relatively small.

Table 16: Ex gratia payment thresholds

Gross income of charity	Maximum ex gratia amount (£)
< £25,000	£1,000
£25,000 ≤ x ≤ £250,000	£2,500
£250,000 ≤ x ≤ £1,000,000	£10,000
> £1,000,000	£20,000

Each ex gratia payment considered by the Charity Commission in 2015 and 2016⁸³ was analysed to determine whether the payment would have fallen above or below the relevant financial threshold, and therefore whether it would have required authorisation under the reformed regime. Table 17 sets out the total number of ex gratia payments considered by the Charity Commission in 2015 and 2016 which would have fallen above and below those financial thresholds.

Table 17: Analysis of payments authorised

Year	Number of applications to the Charity Commission for authorisation to make an ex gratia payment	Number of applications where the proposed payment was above the relevant financial threshold	Number of applications where the proposed payment was below the relevant financial threshold
2015-2016 FY	22	5	17

It is estimated that 17 ex gratia payments (which currently involve Charity Commission authorisation) will no longer require authorisation from the Charity Commission. This means that the affected charities will no longer incur the costs of making an application to the Charity Commission, and the Charity Commission will no longer incur the costs of having to consider and approve the application. These costs are set out in Appendix 4, Table 36. Table 18 sets out the costs savings stemming from the number of ex gratia payments that will no longer require authorisation from the Commission.

Table 18: Cost savings from new statutory power

		Low estimate	Best estimate	High estimate
A. Number of applications which no longer require Charity Commission authorisation		17		
B. Charity Commission costs ⁸⁴		£260		
Charity solicitor costs	C. Cost per hour	£214		
	D. Hours worked ⁸⁵	4	6	8
E. Total savings (A(B+(CD)))⁸⁶		£19,000	£26,300	£33,500

The best estimate of annual savings is £26,300. The present value over 10 years is £0.2 million.

2. Non-monetised benefits

There are expected to be additional savings for charities and the Charity Commission as trustees will no longer have to correspond with the Charity Commission or incur legal costs.

Delays in obtaining Charity Commission authorisation for ex gratia payments can result in reputational damage for charities as deserving claimants are kept waiting. In the case of relatively small ex gratia payments, the recommendation would prevent delays in administering ex gratia payments and therefore prevent any associated reputational damage.

⁸³ The records provided by the Charity Commission may exclude ex gratia payments of £1,000 or less made during the 2015-16 period. This is because current Charity Commission practice is generally not to challenge trustees who make relatively small payments without authorisation on the basis that they may reasonably determine that the administrative costs of applying for authorisation exceed the value of the ex gratia payment. The Commission's approach is discussed further in paragraph B4.3 of its Operational Guidance, OG 539: Ex gratia payments by charities, available at <http://ogs.charitycommission.gov.uk/g539a001.aspx>.

⁸⁴ The Charity Commission estimated that each s 106 order requires approximately £200 worth of staff time plus £60 worth of additional lawyer support. However, it noted that the time and costs involved in dealing with more complex ex gratia cases may be significantly higher than this (for example where engagement with the Attorney General is required). However, as these cases are relatively rare they have not been accounted for in the estimated cost.

⁸⁵ Based on estimates provided by the CLA Working Party.

⁸⁶ Rounded to the nearest £100.

Table 19: Problem 4: Annual cost-benefit and NPV summary (million)

	Low estimate	Best estimate	High estimate
Cost	0	0	0
Benefit	£0.019	£0.026	£0.034
NPV over 10 years	£0.16	£0.22	£0.28

Problem 5: Procedural difficulties when charities incorporate and merge

(1) Summary of the problem and current law

Charities change their organisational form for numerous reasons. An unincorporated charity which has grown over time might benefit from incorporation as a company or CIO to facilitate entering into contracts and to limit the liability of the trustees. People might be reluctant to become trustees of a charity if they have unlimited personal liability for the activities of the charity. A charity's purposes might be better served by merging with another charity, for example, to achieve efficiencies of scale or if a small charity's resources are too small to achieve its purposes effectively.

An incorporation or merger involves the transfer of one charity's activities to another. A merger is usually structured in one of two ways:⁸⁷

11. Charity A transfers its assets to Charity B. Charity A will either be dissolved or remain as a shell charity. Shell charities are the original charities that cease to operate after incorporation or merger, but are kept on the register for practical reasons. Charity B might decide to change its name or to amend its governing document following the merger, but it need not do so.⁸⁸
12. Charity A and Charity B transfer their assets to a new charity, Charity C. Charities A and B will either be dissolved or remain as shell charities.⁸⁹

When an unincorporated charity becomes a corporate charity it transfers its assets to a new (corporate) charity. This is therefore is an example of a type (1) merger.

The Charities Act 2006 established the register of mergers, which is maintained by the Charity Commission. There are 1,942 charities on the register of merged charities.⁹⁰ Registration of a merger gives rise to two consequences. First, it allows "vesting declarations" to be made under section 310, which are intended to effect the transfer of property on merger more efficiently. Second, it enables a gift left by will to a charity that has merged to take effect as a gift to the merged charity.

There are two predominant difficulties.

(i) The availability of trust corporation status

A sole corporate trustee that enjoys trust corporation status is able to give valid receipt for the proceeds of sale arising under a trust of land.⁹¹ Where land is held by a person other than a trust corporation at least two trustees are required to give valid receipt. This is important following any incorporation or merger where a charity wishes to transfer all its assets to a new corporate charity. If any of these assets include land that is to be held on trust by the new corporate charity, it will be important for the corporate charity to have trust corporation status so that it can deal with that land (by giving a valid receipt).

Where a merger is registered with the Charity Commission, the transferring charity can make a "vesting declaration" under section 310 which automatically transfers the transferring charity's property to the new charity. Where a CIO holds permanent endowment as trustee, following a section 310 vesting declaration, the CIO is automatically treated as if it were a trust corporation.⁹² The availability of automatic trust corporation status is advantageous and a strong reason for charities using section 310. Indeed, the availability of trust corporation status is often the reason for using section 310; transactions

⁸⁷ University of Liverpool Charity Law Unit – Mergers: A Legal Good Practice Guide (January 2001) para 9, available at <http://www.liv.ac.uk/media/livacuk/law/cplu/mergersrep.pdf>.

⁸⁸ As a further alternative, Charity B might become a corporate trustee of Charity A.

⁸⁹ As a further alternative, Charities A and B might become subsidiaries of Charity C, a holding company.

⁹⁰ As of 11 September 2017; see <https://www.gov.uk/government/publications/register-of-merged-charities>.

⁹¹ Law of Property Act 1925, s 27(2).

⁹² Charitable Incorporated Organisation (General) Regulations 2012, reg 61(4).

are shoehorned into section 310 in order to obtain the tangential benefit of trust corporation status. When any other charity merges (or when a merger is with a CIO but a section 310 vesting declaration is not used), it is necessary to follow a cumbersome process in order to obtain trust corporation status. Charities will either need a scheme from the Charity Commission or authorisation from the Lord Chancellor.

(ii) Shell charities on the register

Where a merger is registered with the Charity Commission, gifts by will to the transferring charity are deemed by section 311 of the Charities Act to take effect as gifts to the new charity. Case law has revealed that this statutory provision is perhaps not as effective as it was first hoped as it does not divert all gifts to the merged charity: if the gift is conditional on the charity continuing to exist, then section 311 will not operate to divert the gift to the merged charity.⁹³ In consequence, many “shell charities” continue to exist on the register to capture gifts by will that might otherwise fail. The merged charity will incur accountancy, administrative and legal costs in maintaining a shell charity on the register; and there are risks of dormant charities being removed from the register of charities and (in the case of charitable companies) from the register of companies.

Costs associated with Problem 5

Details about how the costs associated with Problem 5 were calculated are set out in Appendix 5.

The costs associated with Problem 5 arise from applying for trust corporation status (either by applying to the Lord Chancellor; appointment by the Charity Commission; or mergers by CIOs using vesting declarations) and from maintaining a shell charity.

- Costs associated with applying to the Lord Chancellor for trust corporation status - £13,100 (£11,000 charities' solicitors' costs and £2,100 Ministry of Justice staff costs).
- Costs associated with Charity Commission appointing trust corporation status - £72,900 (£8,900 Charity Commission staff costs and £64,000 charities' solicitors' costs).
- Costs associated with mergers by CIOs using vesting declarations - £11,200 charities' solicitors' costs.
- Cost per year to charities of retaining shell companies - £1,500 to £2,000 plus VAT.

(2) Options considered to solve the problem

Option 1: Wide-ranging reform

This is the preferred option. It requires primary legislation.

Option 1 would address deficiencies in the law through primary legislative reforms which would modify existing provisions that are not operating effectively and introduce new ones. The problems here stem from the legislation itself and therefore primary legislation is required to address them. Similarly the outcome achieved by the new provisions can only be achieved by primary legislation.

Option 1 would require implementation of the following two recommendations.

- Recommendation 5(a): automatic conferral of trust corporation status

This reform is deregulatory: the new provision confers on charities automatically a status which they would otherwise have had to go through a burdensome process to acquire despite meeting the necessary criteria. Making trust corporation status more widely available would help to remove legal barriers to, and to facilitate, mergers.

- Recommendation 5(b): following a registered merger, the original (transferor) charity is deemed to have continued to exist for the purposes of diverting gifts to the new (transferee) charity

This reform is a simplification: it amends the existing law to make it easier for gifts made to a charity which has merged to take effect as gifts to the new charity thus removing an incentive for retaining shell charities on the register. The reform would mean that when a charity has merged and the merger is registered, for the purposes of ascertaining whether a gift has been made to that merged charity under section 311(2), the original charity should be deemed to have continued to exist despite the merger. That deeming will ensure that gifts to the original charity that are conditional on the charity continuing to exist will still take effect in favour of the new charity.

⁹³ See *Berry v IBS-STL (UK) Ltd* [2012] EWHC 666 (Ch), [2012] PTSR 1619.

(3) Costs and benefits analysis

Option 1

Recommendation 5(a): automatic conferral of trust corporation status

Costs of the reform

There are not expected to be any transitional or ongoing costs specific to this reform.

Benefits of the reform

1. Monetised

Trust corporation status will be automatically conferred on corporate charities in respect of any charitable trusts of which they are the trustee, rather than those charities having to make an application to the Lord Chancellor or to the Charity Commission, or having to shoehorn the transaction into a section 310 vesting declaration. The costs of acquiring trust corporation status via the routes available under the current law are set out in Appendix 5, Table 37.

All of the costs associated with acquiring trust corporation status by application to the Lord Chancellor or by seeking a Charity Commission scheme will be saved. As for the costs associated with acquiring trust corporation status by using a section 310 vesting declaration, consultees reported that most vesting declarations are made in order to obtain trust corporation status, rather than in order to take advantage of the vesting of property. Taking a conservative approach, it is assumed that section 310 vesting declarations will no longer be used in 50% of cases where they are currently used.

Table 20: Cost savings from automatic conferral of trust corporation status

Description	Low estimate	Best estimate	High estimate
A. Cost of applications to Lord Chancellor	£5,845	£10,710	£15,946
B. Cost of Charity Commission appointments	£26,400	£59,710	£108,900
C. 50% of cost of mergers with section 310 vesting declarations where transferee is a CIO	£4,601	£4,601	£4,601
D. Total cost (A+B+C)⁹⁴	£37,000	£75,000	£129,000

The best estimate of annual savings is £75,000. The present value over 10 years is £0.6 million.

2. Non-monetised benefits

The Law Commission's recommendations will make incorporation and merger easier so that charities are not discouraged by the difficulty of the process.

Making trust corporation status more easily available will remove the need for charities to use section 310 vesting declarations solely for the purpose of obtaining the status.

Recommendation 5(b): following a registered merger, transferor charity deemed to have continued to exist in certain circumstances

Costs of the reform

Transitional costs

There are not expected to be any transitional costs specific to this reform.

Ongoing costs

The recommendation is likely to result in more mergers being registered with the Charity Commission, which will create costs for the Charity Commission and for the charities concerned (although there will be

⁹⁴ Rounded to the nearest £'000.

no obligation on charities to register the merger; they only need do so if they wish to take advantage of section 311).⁹⁵

It is necessary to estimate how many additional mergers will be registered with the Charity Commission each year, now that charities can be confident relying on section 311.

The register of merged charities shows that there are around 170 registered charity mergers each year.⁹⁶ Registration is only available where a merger is a “relevant charity merger”, which requires the transferor charity to cease to exist following the merger, meaning that a shell charity cannot be retained. This means that in addition to the 170 registered charity mergers there are a large number of mergers which are not registered, including a certain proportion which cannot be registered because the charity wishes to retain a shell charity.

As they are unregistered, it is difficult to identify how many such mergers take place. Our best estimate is that an additional 10% of mergers are not registered because the transferee charity is retained as a shell charity for the sole purpose of avoiding failed gifts. Our low estimate is that an additional 5% of mergers are not currently registered, and our high estimate is that an additional 20% of mergers are not currently registered.

The Law Commission’s recommendation would remove the need to retain shell charities in these cases, and allow the merger to be registered with the Charity Commission so that the charity can take advantage of section 311.

The cost to the Charity Commission and to charities of registering those additional mergers is set out in Table 21.

Table 21: Annual cost of registering additional charity mergers

Description		Low estimate	Best estimate	High estimate
A. Additional mergers registered with the Charity Commission		9	17	34
B. Cost to the Charity Commission of registering a merger ⁹⁷		£30		
Charity solicitor costs	C. Cost per hour	£214		
	D. Hours worked ⁹⁸	1	1.5	2
E. Total cost (A(B+CD)) ⁹⁹		£2,200	£6,000	£15,600

The best estimate of annual cost is about £6,000. The present value over 10 years is £0.1 million.

Benefits of the reform

1. Monetised

The costs of maintaining a shell charity on the register (to charities and to the Charity Commission) are set out in Appendix 5. In cases where charities are maintaining shell charities for the sole purpose of ensuring that gifts made to the original charity will not fail following a merger, the Law Commission’s recommendation will remove these costs by removing the reason for maintaining a shell charity.

It is estimated above that the number of charity mergers that are registered with the Charity Commission will increase as a result of this recommendation. In those additional cases, the ongoing costs of retaining a shell charity will be avoided because the charity will feel confident relying on section 311. The cost savings associated with this are set out in Table 22. The costs savings are cumulative, since each charity that registers a merger will save the recurring annual cost of maintaining a shell charity

Table 22: Recurring cost savings each year

⁹⁵ Registration of a charity merger is only compulsory where a section 310 vesting declaration is used.

⁹⁶ Based on an average of the number of charity mergers registered between 2014 and 2016.

⁹⁷ Source: Charity Commission.

⁹⁸ Based on discussions with the CLA Working Party.

⁹⁹ Rounded to the nearest £100.

Description		Low estimate	Best estimate	High estimate
A. Number of additional cases each year in which a shell charity no longer needs to be maintained (i.e. additional mergers registered with the Charity Commission)		9	17	34
Annual costs of maintaining a shell charity	B. To charities ¹⁰⁰	£2,100		
	C. To the Charity Commission ¹⁰¹	£40		
D. Average annual total cost (5.5xA(B+C))¹⁰²		£106,000	£200,000	£400,000

The best estimate of recurring cost savings is £36,400 which provides an average cost savings of £200,000 per year over 10 years. The present value over 10 years is £1.7 million.

2. Non-monetised benefits

If a testator has left a gift to a charity, and has not specified what is to happen if that charity has merged, it is likely that their intention would be for the gift to go to the merged charity rather than to fail. By ensuring that fewer gifts fail, this reform upholds the likely wishes of many testators.

Table 23: Problem 5: Annual cost-benefit and NPV summary (million)

	Low estimate	Best estimate	High estimate
Cost	£0.002	£0.006	£0.016
Benefit	£0.14	£0.28	£0.53
NPV over 10 years	£1.12	£2.15	£4.10

Problem 6: Barrier to accessing the Charity Tribunal

(1) Summary of the problem and current law

The Charity Tribunal considers challenges to decisions of the Charity Commission. The decisions that can be challenged are listed in the Charities Act 2011 and are challengeable by way of an appeal or a review, depending on the decision.¹⁰³ The Attorney General or the Charity Commission can also refer to the Charity Tribunal questions concerning charity law.¹⁰⁴ Only two references have been determined by the Charity Tribunal thus far since the Tribunal was established in 2010. Additionally applications to the High Court for judicial review of decisions of the Charity Commission can be transferred to the Upper Tribunal.¹⁰⁵

Trustees involved in legal proceedings will want to ensure that the costs that they incur (and any costs order made against them) can be paid out of the funds of the charity. The trustees of an unincorporated charity can only pay those costs from the charity's funds if they have been properly incurred. In court proceedings, trustees can obtain a "*Beddoe* order" from the court, which provides them with advance assurance that the proposed proceedings are in the interests of the charity and that the costs incurred by the trustees can properly be paid from the charity's funds. However, a *Beddoe* order cannot be obtained from the Charity Tribunal in respect of proceedings before it.

Trustees may be discouraged from pursuing important proceedings in the Tribunal if they are unable to obtain advance assurance that the expenditure will be recoverable from the charity's funds. In theory, trustees could seek a *Beddoe* order from the High Court in respect of the costs of proposed proceedings in the Charity Tribunal, but that involves an excessive and disproportionate additional layer of cost, delay and uncertainty. Moreover, one of the reasons for the creation of the Charity Tribunal was to avoid the need for charities to commence court proceedings; that policy is undermined if *Beddoe* protection in

¹⁰⁰ Based on an average of the estimated cost of between £1,500 and £2,000 plus VAT provided by a stakeholder: see Appendix 5.

¹⁰¹ This cost is based on the assumption that all shell charities will apply for a linking direction.

¹⁰² The average cost over 10 years, rounded to the nearest £'000.

¹⁰³ Charities Act 2011, ss 315(2)(a) and 319 to 324 and Sch 6.

¹⁰⁴ Charities Act 2011, ss 315(2)(b) and 325 to 331.

¹⁰⁵ Senior Courts Act 1981, s 31A.

respect of Tribunal proceedings can only be obtained by going to court. The current position may stop trustees from pursuing proceedings which it would be in the interests of the charity to pursue.

Costs associated with Problem 6

The costs associated with this problem arise from legal and court costs associated with applying for a *Beddoe* order. There is insufficient evidence as to the number of applications currently made to the court, or of the costs of such applications, to calculate the costs.

Further details about the costs associated with using the Charity Tribunal are set out in Appendix 6 below.

(2) Options considered to solve the problem

Option 1: Wide-ranging reform

This is the preferred option. It requires primary legislation.

Option 1 would address deficiencies in the current law through primary legislative reforms which would create a new provision expanding the powers of the Charity Tribunal. As the powers of the Tribunal are set out in primary legislation the only way to amend these powers is through primary legislative reform.

Option 1 would require implementation of the following recommendation.

- **Recommendation 6:** A power for the Charity Tribunal to make “authorised costs orders”

This recommendation would provide trustees with advance protection from the Charity Tribunal in respect of the costs of Tribunal proceedings. Authorised costs orders enable trustees to continue with proceedings knowing that they can recoup any costs incurred from the charity’s funds. The proposal aims to strike a balance between providing trustees with assurance and safeguarding charities’ funds.

(3) Costs and benefits analysis

Option 1

Recommendation 6: a power for the Charity Tribunal to make “authorised costs orders”

Costs of the reform

Transitional costs

The Tribunal Procedure Committee will have to consider the proposals and draft new procedural rules to reflect the new power of the Charity Tribunal to make “authorised costs orders”. Costs are expected to be absorbed as part of the general work of the Tribunal Procedure Committee and the Ministry of Justice secretariat which supports that Committee.

The judges and administrative staff of the Charity Tribunal will require training on the operation of the new authorised costs orders. Costs are expected to be absorbed as part of the judges’ and administrative staff’s regular training programme.

It might be necessary for the Charity Tribunal’s IT system to be updated to provide for the additional jurisdiction to make authorised costs orders. It has not been possible to estimate whether any necessary update would result in additional costs for HM Courts and Tribunals Service.

Ongoing costs

If charities apply for an authorised costs order, they may incur legal fees in making the application. But making the application will be optional. Charities will therefore decide whether to take advantage of the costs protection by making the application. The costs for charities have not been monetised since it will not be compulsory for charities to incur any costs.

The power will create new work for the Charity Tribunal as it will have to deal with additional applications. There will be additional work for staff administering the applications, and for judges deciding them. However, it is estimated that there will be no more than 10 applications for an authorised costs order each year.¹⁰⁶ It is therefore assumed that additional administrative work will be negligible. As for judicial time, almost all applications will be dealt with on paper by a single judge without a hearing,¹⁰⁷ and since costs will be minimal they have not been monetised.

Benefits of the reform

1. Monetised benefits

In order to obtain advance cost protection, trustees would currently have to go to court (although they would rarely do so). The availability of costs protection from the Tribunal will avoid the legal and court costs associated with seeking costs protection from the court. Trustees will be able to obtain equivalent protection from the Tribunal for a lower cost. There is insufficient evidence as to the number of applications currently made to the court, or of the costs of such applications, to calculate the cost saving resulting from the reform.

2. Non-monetised benefits

The new power will provide trustees with certainty regarding their indemnity from the charity's funds. Trustees will no longer be discouraged from commencing necessary proceedings and raising genuine grievances. Trustees will also no longer be discouraged by the prospect of having to go to court to obtain cost protection and the assurance that it brings. They can thereby avoid the associated legal and court costs and delays. The Law Commission's recommendations will therefore improve access to justice.

The proposal will save the Charity Commission the costs of dealing with any applications for advance costs protection by way of issuing an opinion under section 110 or an order under section 105. In addition, the Charity Commission would no longer have to deal with the inherent conflict of interest in making those decisions.

Problem 6: Annual cost-benefit summary

Since there are no monetised costs or benefits in relation to Problem 6, no annual cost-benefit summary is available.

Summary of options

Option 0: do nothing (base case)

Because the "do-nothing" option is compared against itself, its costs and benefits are necessarily zero, as is its NPV. However the problems identified above will continue.

Option 1: wide-ranging reform

Wide-ranging reform comprising, for the purposes of this De Minimus Assessment, six recommendations designed to address key problems.

Table 24 sets out a summary of the monetised costs and benefits for Option 1 for each of Problems 1-6; non-monetised costs and benefits are not included.

¹⁰⁶ In order to estimate the number of claims that would seek an authorised costs order we looked at the different claims that went to the Charity Tribunal in 2015. Of the 13 claims in 2015 we concluded that authorised costs orders would be available for seven of the claims. We then looked at the 2014 claims that reached a final hearing, therefore excluding claims that were withdrawn or struck out. Of the seven claims, authorised costs orders would be available for five claims. In addition, around 1 or 2 cases are appealed from the First-tier Tribunal to the Upper Tribunal each year, so authorised costs orders might be sought in some of those cases. Based on discussions with the Principal Judge of the Charity Tribunal, it is assumed that there will not be significant additional cases issued in the Tribunal as a result of the introduction of authorised cost orders.

¹⁰⁷ Based on discussions with the Principal Judge of the Charity Tribunal, it is estimated that each application would take around 2 hours of judicial time.

Table 24 Option 1 - monetised costs and benefits (million)

	Low estimate	Best estimate	High estimate
Problem 1			
Transitional cost	N/Q	N/Q	N/Q
On-going cost	N/Q	N/Q	N/Q
Present value over 10 years (Cost)	N/Q	N/Q	N/Q
Transitional benefit	N/Q	N/Q	N/Q
On-going benefit	£0.185	£0.185	£0.185
Present value over 10 years (Benefit)	£1.59	£1.59	£1.59
Net Present value	£1.59	£1.59	£1.59
Problem 2			
Transitional cost		N/Q	N/Q
On-going cost	N/Q	N/Q	N/Q
Present value over 10 years (Cost)	N/Q	N/Q	N/Q
Transitional benefit	N/Q	N/Q	N/Q
On-going benefit			
Present value over 10 years (Benefit)			
Net Present value	£19.82	£24.71	£34.81
Problem 3			
Transitional cost		N/Q	N/Q
On-going cost	N/Q	N/Q	N/Q
Present value over 10 years (Cost)	N/Q	N/Q	N/Q
Transitional benefit	N/Q	N/Q	N/Q
On-going benefit			
Present value over 10 years (Benefit)	N/A	N/A	N/A
Net Present value	N/A	N/A	N/A
Problem 4			
Transitional cost	N/Q	N/Q	N/Q
On-going cost	N/Q	N/Q	N/Q
Present value over 10 years (Cost)	N/Q	N/Q	N/Q
Transitional benefit	N/Q	N/Q	N/Q
On-going benefit	£0.019	£0.026	£0.034
Present value over 10 years (Benefit)	£0.16	£0.22	£0.28
Net Present value	£0.16	£0.22	£0.28
Problem 5			
Transitional cost	N/Q	N/Q	N/Q
On-going cost	£0.002	£0.006	£0.016
Present value over 10 years (Cost)	£0.019	£0.052	£0.134

Transitional benefit	N/Q	N/Q	N/Q
On-going benefit	£0.14	£0.28	£0.53
Present value over 10 years (Benefit)	£1.23	£2.37	£4.55
Net Present value	£1.21	£2.32	£4.42
Problem 6			
Transitional cost	N/Q	N/Q	N/Q
On-going cost	N/Q	N/Q	N/Q
Present value over 10 years (Cost)	N/Q	N/Q	N/Q
Transitional benefit	N/Q	N/Q	N/Q
On-going benefit	N/A	N/A	N/A
Present value over 10 years (Benefit)	N/A	N/A	N/A
Net Present value	N/A	N/A	N/A

TOTAL			
Transitional cost	N/Q	N/Q	N/Q
On-going cost	0.002	0.006	0.016
Present value over 10 years (Cost)	0.019	0.052	0.134
Transitional benefit	N/Q	N/Q	N/Q
On-going benefit	2.47	3.13	4.47
Present value over 10 years (Benefit)	21.29	26.97	38.51
Net Present value	21.17	26.93	38.49

Summary

Option 1 will give charity trustees increased flexibility, it will remove unnecessary regulation, it will give charities greater certainty, and it will rationalise and clarify the law. Ultimately, it will enable charities to work more efficiently and successfully, thereby freeing up their resources to be spent in direct furtherance of their charitable purposes.

Equality Impact Assessment

We have completed the screening questions and do not expect these reforms to have any adverse impact on the groups of people with protected characteristics. In fact we anticipate that there will be a positive impact on all the groups of people identified as there will be a positive impact on the charity sector which works with and supports people from all of these groups.

Health Impact Assessment

We have completed the screening questions and do not expect these reforms to have any adverse impact on health. We anticipate that there will be a positive impact stemming from the positive impact on charities many of which work to improve health or the social, economic and environmental living conditions which indirectly affect health. There will be no increased demand for or access to health and social care services as many charities already provide these services and these reforms will benefit those charities.

Justice Impact Assessment

A separate Justice Impact Assessment has been prepared and submitted to the Ministry of Justice. In summary: two of the 43 Law Commission proposals are relevant to the Tribunals system. These are that 1) decisions by the Charity Commission not to authorise an ex gratia payment under section 106 should be subject to review by the Charity Tribunal; and 2) the Charity Tribunal be given the power to make “authorised costs orders” in respect of proposed or ongoing Tribunal proceedings.

We considered evidence about the likely volume of work that this would generate for the Tribunal. We concluded that the volume of reviews of ex gratia payments (1) and applications for “authorised costs orders” (2) which the Charity Tribunal will be asked to do as a result of this change will be minimal. The Chamber procedure rules will need to be updated to cater for authorised costs order applications. The Chamber President agreed with this view.

Small business impact

The proposed reforms will impact positively on all charities large and small, however we anticipate the greatest benefits will be felt by small charities for whom administrative burdens, legal and professional costs are likely to be most prohibitive and disproportionate. There are not anticipated to be any negative impacts on small charities.

Trade Impact

There are no impacts on international trade and investment.

Post implementation review

Many De Minimus policies do not need to be reviewed. However, an approach to monitoring and evaluation is still needed to be outlined.

75. Consider whether the policy be reviewed. Either provide an outline of what a potential PIR will cover or provide explanatory text outlining the reasons one is deemed unnecessary. Further guidance on statutory review clauses is available from the Better Regulation Unit.

76. A comprehensive review plan is especially beneficial in policies with limited evidence, high risks or the potential for unintentional consequences.

Appendix 1: Costs associated with Problem 1

Unincorporated charities

A sample was taken of eight months of Charity Commission schemes (from September 2016 to April 2017). Over this period 65 schemes making amendments to governing documents were identified. This figure was extrapolated to give an estimated yearly figure of 98 schemes. We are not aware of any seasonality in applications for Charity Commission schemes and extrapolate from the 8-month sample on this basis.

In order to estimate the total cost of these schemes to charities and to the Charity Commission it was necessary to identify how many were cy-près and how many were administrative (as the respective time and cost involved differs between the two). The results are set out in Table 26.

Table 26: costs of amending governing documents under the current law

	Amendments requiring cy-près scheme	Amendments requiring administrative scheme	Total schemes required
A. Raw total (8 months)	47	18	65
B. Estimated yearly total (12(A/8))	71	27	98

Where an unincorporated charity does not have an express power to amend in its governing document and cannot use sections 275 or 280 of the Charities Act, it must apply to the Charity Commission for a scheme in order to amend its governing documents. The current costs of obtaining a cy-près or administrative scheme are set out in Tables 27 and 28.

Table 27: costs of cy-près schemes

		Low estimate	Best estimate	High estimate
A. Number of cy-près scheme applications ¹⁰⁸		71		
Unit cost	B. Charity Commission costs ¹⁰⁹	£500	£516	£660
	Charity solicitor costs	C. Cost per hour		
		D. Hours worked ¹¹⁰	10	11
	E. Total (CD)	£2,140	£2,354	£2,568
Yearly cost	F. Charity Commission (AB)	£35,500	£36,636	£46,860
	G. Charities (AE)	£151,940	£167,134	£182,328

¹⁰⁸ See Table 26.

¹⁰⁹ The Charity Commission estimated that each cy-près scheme requires approximately £500 worth of staff time with some more complex cases requiring legal advice costing an additional £160. £500 is therefore used as a low estimate and £660 as a high with the best estimate being that 10% of cases will require the additional £160, giving an average cost of £516.

¹¹⁰ Estimates provided by the CLA Working Group.

Table 28: costs of administrative schemes

		Low Estimate	Best Estimate	High Estimate
A. Number of administrative scheme applications ¹¹¹		27		
Unit cost	B. Charity Commission costs ¹¹²	£200	£208	£280
	Charity solicitor costs	C. Cost per hour	£214	
		D. Hours worked ¹¹³	10	11
	E. Total (CD)	£2,140	£2,354	£2,568
Yearly cost	F. Charity Commission (AB)	£5,400	£5,616	£7,560
	G. Charities (AE)	£57,780	£63,558	£69,336

The sum of the yearly cost of administrative and cy-près schemes to charities and the Charity Commission was used to calculate the total yearly cost of using schemes to amend governing documents.

Table 29: total costs of schemes to amend governing documents

Cost	Low estimate	Best estimate	High estimate
Charity Commission ¹¹⁴	£40,900	£42,252	£54,420
Charities ¹¹⁵	£209,720	£230,692	£251,664
Total	£250,620	£272,944	£306,084

Corporate charities

The costs to corporate charities of making amendments to their governing documents is significantly lower than that to unincorporated charities because there is no need to obtain a Charity Commission scheme. The costs associated with corporate charities making alterations to their governing documents are set out in Table 30.

Table 30: costs when corporate charities amend their governing documents

		Regulated alteration			Unregulated alteration		
		Low estimate	Best estimate	High estimate	Low estimate	Best estimate	High estimate
A. Charity Commission costs ¹¹⁶		£40	£48	£120	£0		
Charity solicitor costs	B. Costs per hour	£214			£214		
	C. Hours worked ¹¹⁷	1	4	6	0.5	3	5
Total (A+BC)		£254	£904	£1,404	£107	£642	£1,070

Statutory and Royal Charter charities

Royal Charter charities and statutory charities vary widely in their size and remit, so must seek bespoke advice on any alterations from the relevant authority. The Privy Council Office routinely consults with the relevant government departments on receipt of an application for a Charter, Supplemental Charter, byelaws or amendments to byelaws. In cases where proposed amendments are considered to be inappropriate, the process can become time consuming. The Privy Council noted that it dealt with only 2-3 new Charters per year and around 34 Charter amendments, and reported receiving positive feedback about the process. The Law Commission consultation received evidence of some instances of a more lengthy process: The Royal Statistical Society (a Royal Charter charity), in its response to the

¹¹¹ See Table 26.

¹¹² The Charity Commission estimated that each administrative scheme requires approximately £200 worth of staff time with some more complex cases requiring legal advice costing an additional £80. £200 is therefore used as a low estimate and £280 as a high with the best estimate being that 10% of cases will require the additional £80, giving an average cost of £208.

¹¹³ Estimates provided by the CLA Working Group.

¹¹⁴ Table 27, F, and Table 28, F.

¹¹⁵ Table 27, G, and Table 28, G.

¹¹⁶ The Charity Commission estimates that each application for consent to a regulated alteration requires approximately 2 hours of pay band 3 staff time, valued at £40. However, some more complex cases require legal advice in addition, typically two hours of time from a lawyer at pay band 6a, valued at £80. Our best estimate assumes that 10% of cases will require this additional lawyer time.

¹¹⁷ Estimates provided by the CLA Working Group.

Law Commission's consultation, described a minor change to the election of its Vice President involving a six-week wait for comments from the Privy Council Office. Cancer Research UK (also a Royal Charter charity) described the process as being time-consuming. One statutory charity, the National Churches Trust, reported a recent experience of amending various provisions in its governing Act by section 73 scheme, a process which took ten years to complete.

Appendix 2: Costs associated with Problem 2

Restrictions on land transactions

RICS reports

A RICS report for a land transaction costs between £400 and £2,000, depending on the complexity of the transaction.¹¹⁸ Reports in respect of some particularly complex or valuable assets (such as a large development site, or a historic building) would cost significantly more. Cancer Research UK is reported to spend approximately £100,000 a year on reports in order to comply with the Charities Act requirements.¹¹⁹

In order to estimate the total costs of complying with the current requirement to obtain a RICS report, it was necessary to identify the total number of charity land transactions each year that must currently comply with the requirement to obtain a report. To do this, registered land transactions carried out by charities between 2013 and 2016 were analysed. HM Land Registry provided data concerning the following types of disposition:

11. Transfers of whole title for value where there was a Form E restriction¹²⁰ on the register prior to the transfer.
12. Transfers of whole title not for value where there was a Form E restriction on the register prior to the transfer.
13. Transfers of part title where there is a Form E restriction on the old title register.
14. Grants of a first (registrable)¹²¹ lease where there is a Form E restriction on the old title register.

Table 31: Total land transactions

Year	Whole title		Part title	First leases	Total
	Transfers for value	Transfers not for value			
2013	990	598	1,236	2,626	5,450
2014	1,052	490	1,400	3,881	6,823
2015	1,203	439	3,007	5,908	10,557
2016	1,099	689	3,107	3,789	8,684
Average	1,086	554	2,188	4,051	7,879

Source: HM Land Registry

From this data, it was estimated that there are 7,878 recorded charity land transactions each year. In order to estimate the number of charity land transactions that have to comply with the requirement to obtain a RICS report, under Part 7 of the Charities Act 2011, that figure was adjusted as follows.

11. The figure of 7,878 was uplifted to account for various transactions which would not be included in the HM Land Registry data.¹²²
 - 2a. When the land was acquired before the Charities Act 1992, a Form E restriction will not have been entered on the register.¹²³ There is no data showing when charity land was acquired. The total number of land transactions was uplifted by 5% to account for the estimated number involving land that was acquired by the charity before 1992.

¹¹⁸ In consultation, Bates Wells Braithwaite reported a range of £500 to £2,000. Val James reported £400 to £1,800.

¹¹⁹ J Rigg, "Tough Terrain" (March 2007) *STEP Journal* 28, p 29.

¹²⁰ A Form E restriction should appear on the register when the land is held by or on trust for a charity. The restriction requires the charity trustees to certify that the requirements of the Charities Act 2011 have been complied with before the Registrar will register a transaction.

¹²¹ Leases are only compulsorily registrable if granted for a term of over 7 years.

¹²² Where a disposition is of unregistered land, there will be no record at HM Land Registry nor a Form E restriction. According to HM Land Registry, of all transfers of whole or transfers of part registered by HM Land Registry, 98% are of registered land and 2% are of unregistered land. Given that the proportion of unregistered land transactions is so low they have been discounted from the calculations below.

¹²³ Since the 1992 Act introduced the requirement to include a statement, and the registration of a Form E restriction.

- 2b. When land is left to charity by will but is sold without the charity ever becoming the registered proprietor, no Form E restriction will appear on the register.¹²⁴ Based on discussions with the Institute of Legacy Management, it is estimated that there are at least 1,225 such charity land transactions each year.¹²⁵ The total number of land transactions was augmented by 1,225 to account for this.
- 2c. There may have been an oversight in entering a Form E restriction when the land was registered. It is estimated that such cases will be negligible.
- 2d. Where the registered proprietor declares a trust over the land in favour of charity, there is no trigger for a Form E restriction to be entered since there is no change to the registered proprietor (despite the trustees being obliged to apply for a restriction to be entered).¹²⁶ It is estimated that such cases will be negligible.
- 2e. The data from HM Land Registry does not include disposals of certain interests in charity land for which a RICS report is required, such as the grant or surrender of an easement, or the release of a restrictive covenant. There is no data on the number of such disposals. It is estimated that such cases will be negligible.
13. The uplifted number of land transactions was then reduced to take account of various exemptions from the requirement to obtain a RICS report under Part 7 of the Charities Act 2011. Where a transaction is for nil consideration, it is likely to fall within one of these exemptions.¹²⁷ In addition, transfers which simply reflect a change of trustees do not require a RICS report.¹²⁸ The 554 transfers of whole title not for value in Table 31 above were therefore discounted.

The best estimate of the total number of charity land transactions that must currently comply with the requirement to obtain a RICS report is set out in Table 32.

Table 32: Charity land transactions for which a RICS report is required

Total number of charity land transactions from HM Land Registry data	7,878
Uplift by 5% for transactions involving land acquired before 1992	394
Add legacy cases	1,225
Sub-total:	9,497
Subtract transfers of whole title not for value	554
Total number of dispositions where a RICS report is currently required	8,943

It is therefore estimated that 8,943 dispositions must currently *comply* with the requirement to obtain a RICS report. However, the costs of obtaining a RICS report will not be incurred in every case. According to the National Association of Estate Agents, approximately 25% of its branches are regulated by RICS, meaning that they either employ a member of RICS or have a RICS surveyor available on call. In the vast majority of cases where a charity uses a RICS regulated estate agent, the cost of obtaining a RICS report will be wrapped up in the estate agent's commission and the charity will not incur an additional cost.¹²⁹ In calculating the overall costs to charities of complying with the RICS report requirement it is necessary to deduct the dispositions in which this is the case.

¹²⁴ For an explanation of why this occurs, see para 7.59 of the Law Commission's report.

¹²⁵ The ILM reached this estimate by taking the total value of legacy gifts each year (£2.5 bn), 85% of which comes from residuary gifts (£2.125 bn). They estimate that 35% of the value of an estate is made up of property (£0.74 bn). Assuming that all this residue is going to charity and an average house price of £257,000, this gives an estimated 3,500 properties left to charity each year. They estimate that in 35% of these cases Part 7 is engaged and ought to be complied with.

¹²⁶ Charities Act 2011, s 123(3)-(5).

¹²⁷ Charities Act 2011, s 117(3)(c).

¹²⁸ HM Land Registry Practice Guide 14, para 6.2, at

<https://www.gov.uk/government/publications/charities-advice-for-applications-to-be-sent-to-land-registry/practice-guide-14-charities#execution-by-charity-trustees>.

¹²⁹ Based on discussions with the NAEA and anecdotal evidence from consultation.

It is assumed that an estate agent will be used in all dispositions of residential land and therefore in 25% of those dispositions the cost of the RICS report will be wrapped up in the estate agent's commission. It was therefore necessary to estimate the number of dispositions of charity land involving residential property. In order to do so, a sample was taken of all recorded charity land transactions in 2016,¹³⁰ and the percentage of those transactions that involved residential property, rather than commercial or agricultural land, was calculated.¹³¹ The percentage of the 2016 sample transactions that were residential properties was then applied to the total number of recorded charity land transactions in order to ascertain the number of transactions involving residential land. Table 33 sets out the results of this analysis.

Table 33: Analysis of charity land transactions

	Whole title		Part title	First leases	Total
	Transfers for value	Transfers not for value			
Charity land transactions in 2016 ¹³²	1,099	689	3,107	3,789	8,684
% of 2016 sample that were residential properties	61%	N/A ¹³³	29%	80%	N/A
Average number of charity land transactions each year ¹³⁴	1,086	554	2,188	4,051	7,878
% applied to average	662	N/A	34	3240	4,536
Overall percentage of recorded charity land transactions that involved residential land¹³⁵					

It is estimated that, under the current law, RICS reports are obtained for a total of 8,943 land transactions each year: see Table 32 above. Applying the percentage calculated in Table 33 to that total figure gives an estimated 5,187 of those land transactions which involve residential land. Assuming that in 25% of these cases the cost of obtaining a RICS report will be wrapped up in the estate agent's commission, there are approximately 1,297 transactions for which charities will not have to incur an additional cost as a result of the RICS report requirement. Therefore of the 8,943 land transactions requiring a RICS report each year, 7,646 involve an additional cost to the charity as a result of that requirement. Table 34 sets out an estimate of these costs.

Table 34: Costs of obtaining a RICS report

	Low estimate	Best estimate	High estimate
A. Number of transactions	7,646		
B. Cost of a RICS report	£500	£600	£800
C. Total cost (AB)	£3,823,000	£4,587,600	£6,116,800

The 1992 Regulations

The 1992 Regulations set out detailed requirements concerning the content of RICS surveyors' reports. Surveyors have to cross-check their reports against those detailed requirements to ensure that they

¹³⁰ See Appendix 2, Table 31. We took a sample of 10% of transactions in categories (1) and (2), and a sample of 1% of transactions in categories (3) and (4).

¹³¹ We used the address of the property from HM Land Registry data and used Google Maps to categorise the land in question as residential, commercial, agricultural or other land.

¹³² Table 31.

¹³³ We do not expect these transactions to benefit from advice from an estate agent. They will likely be exempt anyway or need more specialist advice. This figure has already been removed from the total number of recorded transactions that currently require a RICS report.

¹³⁴ Table 31.

¹³⁵ 4,536/7,878x100.

comply. In addition, surveyors have to address expressly in their reports issues that might be irrelevant to the substance of their advice, but which are specified in the 1992 Regulations and must therefore be included.

Conveyancers for charities then spend time checking whether their charity client's surveyor has addressed all the matters set out in the 1992 Regulations.

Appendix 3: Costs associated with Problem 3

Where a charity wishes to spend its permanent endowment and does not fall within section 281 (because its income and the value of the fund is too high) it must seek Charity Commission consent under section 282. The Charity Commission estimates that an application under section 282 for consent to the release of permanent endowment costs it approximately £40 in staff time plus an additional £80 of lawyer time in some more complex cases. There are also associated costs to charities releasing restrictions on their permanent endowment. Consultees reported that using section 282 takes significantly longer than section 281 due to correspondence with the Charity Commission. The Charity Law Association (“CLA”) estimated that a section 282 application requires two hours or more of solicitor time, depending on its complexity.

Analysis carried out by the Charity Commission in 2012 showed that 14,000 out of the 162,000 charities registered with them had permanent endowment. Of these over 8,000 had an annual income of less than £10,000. A 2013 survey carried out by the Association of Charitable Foundations found that a third of the 210 respondents held assets that are substantially¹³⁶ permanently endowed.¹³⁷ Older charities were more likely to have a higher proportion of permanent endowment.¹³⁸ However, this data is not sufficient to estimate how many charities currently have to use section 282 instead of section 281.

Where a charity wishes to borrow from its permanent endowment under the current law it will generally apply to the Charity Commission for an order under section 105 permitting it to do so. The Commission estimates that an application under section 105 costs approximately £20 in staff time with some more complex cases requiring additional legal input costing approximately £80. The alternative is to obtain a scheme from the Charity Commission. The costs of obtaining such a scheme are similar to those associated with obtaining an administrative scheme, as discussed under Problem 1 above. Data is not available regarding the number of section 105 orders and schemes which are made to enable charities to borrow from their permanent endowment.

¹³⁶ More than three quarters of the portfolio.

¹³⁷ ACF, *For good and not for keeps: how long-term charity investors approach spending on their charitable aims* (February 2013). Available at <http://www.acf.org.uk/policy-practice/research-publications/for-good-and-not-for-keeps>.

¹³⁸ As above.

Appendix 4: Costs associated with Problem 4

Remuneration for the supply of goods

Table 35: costs of obtaining authorisation for payment for provision of goods

		Low estimate	Best estimate	High estimate
Charity solicitor costs	A. Cost per hour	£214		
	B. Hours worked ¹³⁹	4	6	8
C. Charity Commission costs ¹⁴⁰		£20	£28	£100
Total per authorisation (AB+C)		£884	£1,312	£1,740

Ex gratia payments

Table 36: costs of authorising an ex gratia payment

		Low estimate	Best estimate	High estimate
A. Number of applications for Charity Commission authorisation ¹⁴¹		22		
B. Charity Commission costs ¹⁴²		£260		
Charity solicitor legal costs	C. Cost per hour	£214		
	D. Hours worked ¹⁴³	4	6	8
Total cost A(B+(CD))		£24,552	£33,968	£43,384

Equitable allowances

The costs of seeking an equitable allowance from the court have not been calculated because such cases are extremely rare and vary widely in their complexity. The legal costs of any such proceedings would, however, be significant. The Charity Commission estimates that it receives no more than one or two such cases per year.¹⁴⁴ The Commission described a recent, relatively complex case which cost approximately £800 in lawyer time. There are also costs to the Charity Commission in having to explain its complicated process for approving equitable allowances.

¹³⁹ Based on estimates provided by the CLA Working Party.

¹⁴⁰ The Charity Commission estimated that each application requires approximately one hour of pay band 3 staff time, valued at £20. In some, more complex cases, legal advice will be required, typically two hours of time from a lawyer at pay band 6a, valued at £80. For our "best estimate" we have assumed that 10% of applications require this additional lawyer time.

¹⁴¹ The Charity Commission reported that, in the 2015-16 financial year, 48 cases were opened under its ex gratia payments issue code. However, some of these cases may have concerned requests for advice relating to ex gratia payments, rather than applications for orders under s 106 of the 2011 Act. The Commission made 22 s 106 orders to authorise ex gratia payments during the 2015-16 financial year.

¹⁴² The Charity Commission estimated that each s 106 order requires approximately £200 worth of staff time plus £60 worth of additional lawyer support. However, it noted that the time and costs involved in dealing with more complex ex gratia cases may be significantly higher than this (for example where engagement with the Attorney General is required). However, as these cases are relatively rare they have not been accounted for in the estimated cost.

¹⁴³ Based on estimates provided by the CLA Working Party.

¹⁴⁴ However, the Charity Commission said that it is possible that there were one or more additional unrecorded cases where it gave an assurance via a s 110 opinion.

Appendix 5: Costs associated with Problem 5

Trust corporation status

Table 37 sets out the costs of the three current routes to acquiring trust corporation status: (1) applying to the Lord Chancellor; (2) appointment by the Charity Commission; and (3) mergers by CIOs using vesting declarations.

Table 37: cost of acquiring trust corporation status

			Low estimate	Best estimate	High estimate
A. Number of applications to Lord Chancellor			7 ¹⁴⁵		
Lord Chancellor (MoJ)	Policy officer (Band C)	B. Cost per hour ¹⁴⁶	£28		
		C. Hours worked ¹⁴⁷	6	7	9
	Policy officer (Band A)	D. Cost per hour ¹⁴⁸	£50		
		E. Hours worked ¹⁴⁹	0.5	1	2
Charity solicitor costs		F. Cost per hour	£214		
		G. Hours worked ¹⁵⁰	3	6	9
Costs (A(BC+DE+FG))			£5,845	£10,710	£15,946
H. Number of Charity Commission appointments ¹⁵¹			25	35	45
I. Charity Commission costs ¹⁵²			£200	£208	£280
Charity solicitor costs		J. Cost per hour	£214		
		K. Hours worked ¹⁵³	4	7	10
Costs (H(I +JK))			£26,400	£59,710	£108,900
L. Number of mergers with vesting declarations where transferee is a CIO ¹⁵⁴			43		
Charity solicitor costs		M. Cost per hour	£214		
		N. Hours worked ¹⁵⁵	1		
Costs (LMN)			£9,202		
Total cost			£41,447	£79,622	£134,048

¹⁴⁵ The Lord Chancellor received 8 applications in 2013, 8 in 2014 and 5 in 2015. Our estimate is based on the mean of these three figures.

¹⁴⁶ Based on the mid-point of the 2016 salary range for Band C staff at the Ministry of Justice (namely £33,426), uplifted by 30% to reflect ERNIC and pension contributions (£43,454), and assuming a 7-hour working day for 45 weeks of the year.

¹⁴⁷ Based on estimates provided by the Ministry of Justice.

¹⁴⁸ Based on the mid-point of the 2016 salary range for Band A staff at the Ministry of Justice (namely £60,004), uplifted by 30% to reflect ERNIC and pension contributions (£78,005), and assuming a 7-hour working day for 45 weeks of the year.

¹⁴⁹ Based on estimates provided by the Ministry of Justice.

¹⁵⁰ Based on estimates provided by the CLA Working Party.

¹⁵¹ An analysis of all the schemes published by the Charity Commission between September 2016 and April 2017 showed that 30 of them were appointing a corporate trustee. We used this to estimate that there would be 45 such appointments over the course of a full year. The Charity Commission estimated that they made 25 appointments in the 2015-16 financial year. Given the disparity between our estimate for the 2016-17 year and the Commission's for 2015-16 we have used the Commission's estimate as our low estimate, our estimate as the high estimate and an average of the two as our best estimate.

¹⁵² The cost will be the same as the cost of an administrative scheme (see Table 28) above.

¹⁵³ Based on estimates provided by the CLA Working Party.

¹⁵⁴ Source: Register of merged charities, available at <https://www.gov.uk/government/publications/register-of-merged-charities>. Figure is an average of the number of mergers with vesting declarations, where the transferee was a CIO in 2015 and 2016. The Charity Commission's website <http://beta.charitycommission.gov.uk/> was used to identify the number of transferees that were CIOs.

¹⁵⁵ Based on estimates provided by the CLA Working Party.

Shell charities

The annual cost to charities of retaining shell companies was estimated by one consultee at £1,500 to £2,000 plus VAT.¹⁵⁶ Another said it costs an extra 2 to 3 days of professional time.¹⁵⁷

The Charity Commission reported that the costs to it of maintaining shell charities on the register are negligible. However, it noted that in many cases, shell charities apply for a direction under section 12 of the Charities Act 2011 linking them to their associated corporate charity for registration and accounting purposes. The Commission estimates that each linking direction costs it approximately £40 in staff time, with some relatively unusual cases requiring additional legal costs. However, there is not sufficient data regarding the number of section 12 linking directions for linked charities to calculate an overall cost to the Commission of this problem.

¹⁵⁶ Geldards consultation response.

¹⁵⁷ Professor Gareth Morgan response.

Appendix 6: Costs associated with Problem 6

Between 2014 and 2015 the Charity Commission was involved in 32 cases defending their decisions: 25 cases reached a conclusion during 2014 and 2015.¹⁵⁸ One of the Charity Commission's decisions was overturned by the Tribunal, the other 24 were resolved in the Commission's favour or withdrawn by the appellant. Eight challenges were made to the Charity Commission's decisions to open statutory inquiries and five were made to orders for documents or information under section 52.¹⁵⁹

The cost to the Charity Commission of litigation before the Charity Tribunal is set out below:

Table 38: costs to the Charity Commission of litigation before the Charity Tribunal¹⁶⁰

Description	Cost
A. 80% of the total staff cost of the Commission's Litigation & Review Team	£148,113
B. 5% of the total staff cost of the Commission's Legal Director	£7,679
C. 5% of the total staff cost of all other members of the Commission's Legal Services Directorate	£50,056
D. All external costs relating to Tribunal litigation, including Counsel's fees, external copying costs, etc	£25,480
Total cost A+B+C+D	£231,328

The Tribunal is free to use¹⁶¹ but charities will incur costs if they seek legal representation. The Tribunal's records show that since 2008, charity appellants have had legal representation in 39% of cases.¹⁶² The Tribunal has one salaried full-time principal judge, four fee-paid tribunal judges and seven fee-paid members.¹⁶³

The Tribunal has a target to decide 75% of cases within 30 weeks from the time that the application is made to the Tribunal until the decision is published.¹⁶⁴

¹⁵⁸ Charity Commission, Annual Report and Accounts 2014 – 2015, p 12.

¹⁵⁹ As above.

¹⁶⁰ Source: Charity Commission.

¹⁶¹ Although Government has published plans to introduce fees for courts and tribunals. Charities and individuals may be charged up to £600 to bring a case to the Charity Tribunal: R Cooney, "Government plans to press ahead with fees for using the charity tribunal" available at <http://www.thirdsector.co.uk/government-plans-press-ahead-fees-using-charity-tribunal/policy-and-politics/article/1378574>; <http://www.thirdsector.co.uk/legal-diary-grant-giving-guidance-expected-later-year/governance/article/1399550>. The Government has said that it will bring forward the statutory instruments to introduce fees as soon as Parliamentary time allows, see: Court and tribunal fees: government response to consultation on further fees (2016) p 17, available at: <https://www.gov.uk/government/consultations/enhanced-fees-response-and-consultation-on-further-fee-proposals>.

¹⁶² Source: Charity Tribunal.

¹⁶³ <http://blogs.ncvo.org.uk/wp-content/uploads/elizabeth-chamberlain/NCVO-The-Charity-Tribunal.pdf>.

¹⁶⁴ <https://www.lawworks.org.uk/introduction-charity-tribunal>.

Appendix 7: Terminology

What is a charity?

For an institution to be a charity, its purposes must be exclusively charitable. A charity must exist for the benefit of the public generally, not for the benefit of private individuals or entities. The definition of a “charity” in section 1(1) of the Charities Act 2011 does not distinguish between the different legal forms of charities and the Charities Act 2011 applies to all charities regardless of their legal form. The different legal forms that charities can take is explained below.

Charities can either be incorporated, and therefore have a legal personality separate from their trustees or members, or unincorporated and therefore have no separate legal personality.

Incorporated charities

- Companies: charities can be incorporated as companies. They are governed by the Companies Act 2006 and must be registered at Companies House (as well as being registered by the Charity Commission).
- Charitable incorporated organisations (“CIO”): CIOs are a new form of incorporated charity introduced by the Charities Act 2006 as an alternative to the limited company. CIOs only need to be registered with the Charity Commission.
- Statutory charities: a small number of charities have been incorporated by Act of Parliament.
- Royal Charter charities: a charity may be incorporated by a Royal Charter granted by the Sovereign.

Unincorporated charities

- Trusts: a charitable trust involves one or more trustees holding property on trust for charitable purposes. The charity has no members.
- Unincorporated associations: an unincorporated association is an organisation made up of two or more individuals, who are the members of the association and are bound by its rules. The members will usually elect the charity trustees.

Registration of charities

Every charity must register with the Charity Commission, unless it is:

- an exempt charity;
- an excepted charity with an annual income of £100,000 or less; or
- a charity with an annual income of £5,000 or less.¹⁶⁵

Exempt charities

Certain charities are exempt from the requirement to register with the Charity Commission, and from other (but not all) provisions of the Charities Act 2011. They are usually regulated by another body (the “principal regulator”) whose functions overlap with those of the Commission. Exempt charities are listed in Schedule 3 to the Charities Act 2011.¹⁶⁶ They include:

- most English universities;¹⁶⁷
- other educational bodies, such as higher and further education corporations, academies, and foundation and voluntary schools;¹⁶⁸ and

¹⁶⁵ Charities Act 2011, s 30(2). CIOs, however, must register regardless of their income level.

¹⁶⁶ See also Charity Commission, CC23 Exempt Charities (September 2013) para B6, available at <https://www.gov.uk/government/publications/exempt-charities-cc23>.

¹⁶⁷ Charities Act 2011, sch 3, paras 2 to 5. The principal regulator of these charities is the Higher Education Funding Council for England. Welsh universities are not exempt and are therefore regulated by the Charity Commission: see Charity Commission, CC23 Exempt Charities (September 2013) para B6.

¹⁶⁸ Charities Act 2011, sch 3, paras 5 to 11. The principal regulator of these charities is the Department for Education, the Department for Business, Innovation and Skills or the Welsh Government.

- various museums and galleries, such as the Victoria and Albert Museum, the Science Museum and the British Museum.¹⁶⁹

Excepted charities

Charities may be excepted by an order of the Secretary of State or of the Charity Commission, and are known as “excepted charities”. They include:

- some churches and chapels;
- some charities that provide premises for schools;
- Scout and Guide groups; and
- certain armed forces charities.

Charity trustees

Charity trustees are responsible for the control and management of charities.¹⁷⁰ Not all of those who control or manage charities are, technically, trustees: for example, charitable companies are run by directors, not trustees. Nevertheless the terms “charity trustee” and “trustee” are widely accepted as covering all those who run charities, including directors.

Schemes

Schemes are legal arrangements that change or supplement the provisions that would otherwise apply in respect of a charity or a gift to a charity. There are two categories of scheme:

- Cy-près schemes alter the objects of a charity. “Cy-près” means “as near as possible” or “near to this”. Cy-près schemes involve funds being applied for charitable purposes which are similar to the original purposes.
- Administrative schemes alter any other provisions of a charity’s governing document.

Permanent endowment

Permanent endowment is property held by a charity that cannot be spent.

The Charities Act 2011

References to sections are to sections of the Charities Act 2011, unless otherwise stated.

Social investment

A social investment is a transaction through which a charity both directly furthers its purposes and achieves some financial return.¹⁷¹ It can be an efficient way for charities to achieve their purposes and recycle their money.

¹⁶⁹ Charities Act 2011, sch 3, paras 12 to 25. The principal regulator of these charities is the Department for Digital, Culture, Media and Sport, save for the Royal Botanic Gardens, Kew, for which the principal regulator is the Department for the Environment, Food and Rural Affairs.

¹⁷⁰ Charities Act 2011, s 177.

¹⁷¹ Charities Act 2011, s 292A.